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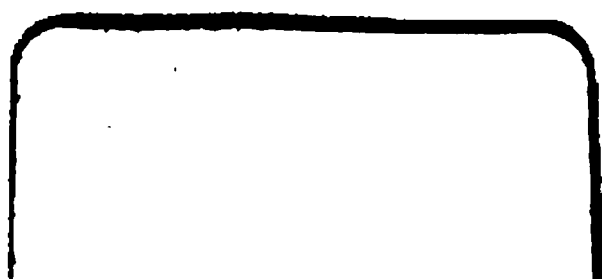
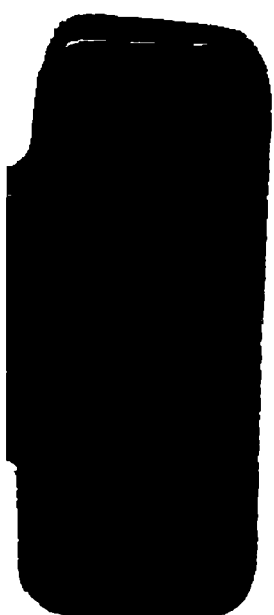
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HOMESTEAD  
AND  
EXEMPTIONS.





THE LAW  
OF  
HOMESTEAD  
AND  
Exemptions.

BY  
JOHN H. SMYTH.

SAN FRANCISCO:  
SUMNER WHITNEY & CO.  
1875.

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## PREFACE.

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The varied and important questions arising under the Homestead and Exemption laws of the several States have become so numerous that no apology is needed for the attempt to collect the cases and state the law as determined thereby. Homestead statutes, first passed by the Republic of Texas less than thirty-six years ago, were quickly followed by the southern, western, and other States, until all except three have incorporated in their statute law some provision for the preservation and protection of the home of a debtor.

The Author has attempted to collect all the cases, giving a general rule of law, where it was possible to do so, and stating the rule in each State where variation of statutes or conflict of decisions made it necessary.

It was deemed wise to set forth the facts of some particular cases, as well as the peculiarities of the statutes under which they arose, that the reader might determine how far the rules laid down therein would apply to other cases or localities, the aim being to make a work which should prove *useful* to the practitioner.

Cases arising under the bankrupt law or concerning personal property have all been collected in the chapters upon those subjects, even though determining the same principles as those announced in the earlier chapters of the book.

That some imperfections should be found in the first work

upon a new and novel theme is to be expected ; the Author can only say that he will be glad to improve upon the present in a second edition, if it should be called for.

SAN FRANCISCO, Oct. 1st, 1875.

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HOMESTEAD.



## CHAPTER I.

### OBJECT AND POLICY.

**§ 1. The object and policy of the homestead law** has been ably discussed in this country, both by the jurist and the legislator. By the one, in interpreting and giving force to the laws for the better protection of the home of the wife and children. By the other, in its political aspect and its influence upon the spirit of freedom and independence with which every American citizen should be imbued. By the one, in putting in motion the arm of the law, which shields the family, to some extent, from the effects of the profligacy of the husband, or the rapacity of his creditors. By the other, in view of the security to the general commonwealth attained by guaranteeing the individual citizen a home to protect. By the one, in giving a liberal and humane interpretation to the law, extending its folds not only around married persons, but around the supporters of the dependent also. By the other, in the consideration of the advantage to the community in inducing the wandering and homeless to become permanent and useful citizens.

**§ 2. The sanctity of home.**—Mr. Chief Justice Hemphill,<sup>1</sup> in speaking of the object and policy of homestead laws, said: “The object of such exemption is to confer on the beneficiary a home as an asylum—a refuge which cannot be invaded, nor its tranquillity or serenity disturbed, and in which may be nurtured and cherished those feelings of individual independence, which lie at the foundation and are essential to the permanency of our institutions. As a measure of sound policy it cannot be too highly commended.”

In a subsequent case, the same eminent jurist said: <sup>2</sup> “That

<sup>1</sup> Wood v. Wheeler, 7 Texas 22.

<sup>2</sup> Franklin v. Coffee, 18 Texas 415.



the homestead exemption was founded upon principles of the soundest policy, cannot be questioned. Its design was, not only to protect citizens and their families from the miseries and dangers of destitution, but also to cherish and support in the bosom of individuals those feelings of sublime independence which are essential to the maintenance of free institutions."

**§ 3. Freehold and tenantry contrasted.**—Col. Thomas H. Benton, as early as the year 1828, in the United States Senate, in the discussion of the proper disposition of the public lands, advocated a general homestead policy, and said:<sup>1</sup> "Tenantry is unfavorable to freedom. It lays the foundation of separate orders in society, annihilates the love of country, and weakens the spirit of independence. The farming tenant has, in fact, no country, no hearth, no domestic altar, no household god. The freeholder, on the contrary, is the natural supporter of a free government; and it should be the policy of republics to multiply their freeholders, as it is the policy of monarchies to multiply tenants. We are a republic, and we wish to continue so: then multiply the class of freeholders. \* \* It brings a price above rubies, a virtuous and independent race, the true supporters of their country."

**§ 4. "The act is founded on the idea,"** said Mr. Justice Sanderson, "that it is good for the general welfare that every family should have a home, a place to abide in, a castle, where it can find a shelter from financial disaster, and protection against the pursuit of creditors, who have given credit with the full knowledge that they cannot cross its threshold."<sup>2</sup> In *Cook v. McChristian*,<sup>3</sup> the object of this "beneficent provision" was declared to be "for the protection and maintenance of the wife and children against the neglect and improvidence of the husband and father." "The leading idea upon which the constitution and statutes are predicated is the protection of the family, and not the exemption of a certain amount of

<sup>1</sup> *Thirty Years in United States Senate*, 103, 104

<sup>2</sup> *Gregg v. Bostwick*, 33 Cal. 228.

<sup>3</sup> 4 Cal. 26; *Taylor v. Hargous*, Id. 273

real estate."<sup>1</sup> And Hon. J. A. Collins, in the Nevada Constitutional Convention,<sup>2</sup> said: "I do think that this idea of the homestead is one of the sublimest ideas of our age. It is a principle which has sought *form* and *shape*, and comes like an angel of mercy to hover over and bless the families of our nation."

**§ 5. Rural policy.**—In the case of *Walker v. Darst*,<sup>3</sup> Morrill, C. J., said: "It was a great triumph in civilization when the organic law of a State provided that 'No person shall be imprisoned for debt'; but a still greater impetus was given to the happiness of families, when the organic law of a State protected a homestead from the inroads of a sheriff."

In speaking of the rural homestead, the same enlightened judge, in the same case, (on p. 686) said: "It is not improbable that the intention" (of the law-making power) "was to favor the farmer and planter in every practical manner. \* \* By saying to the farmer that he can select two hundred acres of land, which he may put in the highest state of cultivation, and upon which he may place whatever may contribute to either his real or imaginary wants, or necessities, or fancy, and that his home will never be invaded by a creditor or his agent, but shall always be sacred as a home, is not a small or slight inducement to a man to engage in agriculture. By assuring the wife and mother that she can retire into a rural district and select from the vast regions of Texas a place free from the scenes and allurements of a city, and there bring up and educate her family, and to know that, while she is beautifying her home and adding comforts to conveniences, and fancy to comforts, this home is her home; that whatever misfortune may befall her husband, either in business or habits, this home is secure, and no one can take it from her and her children, is a persuasive argument to a country life."

**§ 6. Sanctity of the home.**—In the Nevada Constitutional Convention of 1864, ex-Minister De Long, in speaking

<sup>1</sup> *Lies v. Diablar*, 12 Cal. 327.

<sup>2</sup> *Nevada Constitutional Debates and Proceedings*, p. 287.

<sup>3</sup> 31 Texas 682.

of the adoption of the homestead provision, said: "This idea is one which is founded upon the old English maxim, that every man's house is his castle—that it is his sanctuary and retreat from all the cares of life, and all the persecutions which the world can bring against him. \* \* We ought to frame our constitution in such a manner as to carry out that view. \* \* Then \* a man can go on, with that feeling of security and pride which the head of a family likes to enjoy in his domestic affairs, to beautify and adorn his home. He can do so with a full consciousness that no trick of the law, no covetousness of his neighbor, can take from him that household altar, after he has prepared it, as the place where he expects to live and die, and where his wife and children are to reside when he has gone from them. \* \* They will be made happy by retaining that little spot of earth which is always sacred to the human heart. The birth-place of the children would be left to them, and the family could still live in the home hallowed by the associations of the past. \* \* The "object and design of the homestead law \* \* is to give to every man security for *his castle*—for his home—to assure him that the place where his children have been born shall not, in any event, be taken away from him—to give him an opportunity to go on, without any fear that his little place will be at last stripped from him, to make all those little adornments which are so dear to his heart."<sup>1</sup>

§ 7. "That the interest and protection of the wife entered largely into the consideration that induced the provision in our constitution, protecting the homestead, there cannot be the smallest doubt; that she should have an asylum from which the creditor, by the process of law, could not force her and her children, and rudely drive them from a home sanctified by so many sweet and endearing recollections, to be exposed not only to physical suffering, but, alas! to the more baneful and blighting influences so often and so successfully brought to bear on the unfortunate when necessity and not

<sup>1</sup> Nevada Constitutional Debates and Proceedings, 1864, pp. 285, 286, 289.

the will consents to infamy. Protect the home of the wife, and the opportunity is in some measure afforded, by frugality and honest industry, to support herself and children and to prevent some of the worst calamities that the profligacy of the husband could bring on them. These were, doubtless, some of the considerations that influenced the framers of our constitution in engrafting the homestead exemption as a cardinal law of the land."

"There were, however, other considerations, that would not be overlooked by wise philanthropists and philosophic minds accustomed to look deep into the sources of all those evils that so canker and corrode society; ascending those streams to their sources, it will be found that by far the greatest part take their rise not in self-existing crime, but in misfortune incident to the condition of man. The laws should punish crime, but not misfortune; the latter should be protected, and should not permit the unfortunate to be treated as animals and hunted down, by the aid of the law, as culprits. When this is not done some of the most benevolent hearts are driven, by such omissions and defects in the law, into ultraism, socialism, and Fourierism, and an opposition to all municipal regulations. Hence, the profound wisdom of our homestead law. It is natural to the unfortunate to be grateful to those from whom they receive aid in their afflictions, and they will love and venerate the laws when they protect misfortune and not force them into the class of culprits. The homestead is a point from which they can start, released from any fear of their families being turned out without a home, and can commence again, *Antæus*-like, with renewed energy and strength and capacity for business from their fall, unscathed by temptation; and, from experience, more practical and useful members of society. With the homestead protection thrown around him the husband may well exclaim: 'I am a king, and my wife is a queen, and our domain is our home, that none dare invade.' Profoundly impressed with the wisdom in which our homestead policy is founded, and fully impressed with its ameliorating influences, we admit that it is entitled

to the most liberal construction for the accomplishment of its objects."<sup>1</sup>

**§ 8. Beneficent features of modern legislation—Its extent.**—The Hon. J. H. Warwick, of Nevada, in speaking of homestead exemption,<sup>2</sup> said: "This provision in our organic law I regard as being one of the most wise and beneficent features of modern legislation. It is a feature which has been incorporated into the organic law of every State in the Union which has formed or remodeled its constitution during the last ten years; and it is one which, by legislative action, has been incorporated into the laws of every State and Territory \* of the American Union.<sup>3</sup> We feel what it is to have children growing up around us—what it is to rest beneath the family roof-tree, or to rear that sacred structure, whether it be great or small, to which we all look as a shelter and a home. \* \* I want this provision as a protection to the wives and children of this Territory. If the industry of the husband has accumulated sufficient for a home, and he has afterwards become dissipated, I still wish to say that the wife and children shall retain a rallying place, which shall be entitled to the sacred name of home, and of which no action of the husband can deprive them."<sup>4</sup>

**§ 9. The independence of the citizen,** as a matter of public policy, was thus alluded to by Justice Baldwin, of Iowa: "This act of the Legislature, in giving to each citizen of the State a homestead, is based upon the idea that it is a matter of public policy, for the promotion of the property of the State, and the general good of the people; that such citizen should be independent and above want; that he should have a home, a place where he and his family may live in society, beyond the reach of financial misfortune, and the demands of creditors."<sup>5</sup>

<sup>1</sup> *Travick v. Harris*, 8 Texas 314; *True v. Morrill*, 28 Vt. 674; *Robinson v. Wiley*, 15 N. Y. 494.

<sup>2</sup> Nevada Constitutional Debates and Proceedings, July 13th, 1864.

<sup>3</sup> With the exception of two States and Territories.

<sup>4</sup> Report of Proceedings, pp. 281, 282.

<sup>5</sup> *Parsons v. Livingston*, 11 Iowa 106; *Charles v. Lamberson*, 1 Iowa 439.

**§ 10. New rule in regard to extent of property liable for debt.**—So in New York the same general idea is expressed: "The statute is founded upon considerations of public policy, and has introduced a new rule in regard to the extent of property which shall be liable for a man's debts. The Legislature were of the opinion, looking to the advantages belonging to the family state in the preservation of morals, the education of children, and possibly even in the encouragement of hope in unfortunate debtors, that this degree of exemption would promote the public welfare."<sup>1</sup>

**§ 11. Humane character of such laws.**—In Vermont, it is said that, "the object of the law creating a homestead, which should not be subject to the debts of the husband, is of a humane character, and should be held to apply fairly to all cases as are within the equity and spirit of the act,"<sup>2</sup> and in Ohio the law is characterized as possessing the same wise and enlightened attributes:

"The humane policy of the homestead act seeks not the protection of the debtor, but its object is to protect his family from the inhumanity which would deprive its dependent members of a home \* \* and in aid of this wise and humane policy the whole act should receive as liberal construction as can be fairly given to it."<sup>3</sup>

**§ 12. Benton's policy—Duty of State to freeholder.**—The idea suggested by Senator Benton,<sup>4</sup> as to the policy that should be adopted by the general government, seems to have germinated, after thirty-four years' nurture in the bosom of the republic, in the Act of May, 1862,<sup>5</sup> which provides that, "No lands acquired under the provisions of this act shall, in any event, become liable to the satisfaction of any debt or debts contracted prior to the issuing of the patent therefor."

<sup>1</sup> Robinson v. Wiley, 15 N. Y. 494.

<sup>2</sup> True v. Morrill, 28 Vt. 674; McClary v. Bixby, 36 Vt. 257; Lillotson v. Millard, 7 Minn. 519; Roff v. Johnson, 40 Ga. 555; Noland v. Wickham, 9 Ala. 169; Cusic v. Douglas, 3 Kansas 123; Bronson v. Kinzie, 1 Howard U. S. 311.

<sup>3</sup> Sears v. Hanks, 14 Ohio St. 300, 301.

<sup>4</sup> Sec. 8.

<sup>5</sup> 12 U. S. Stat. 392. Revised Statutes, Sec. 2296.

The general government, having protected the settler, under the foregoing act, in the enjoyment of his home while under its sovereignty, and handing him over, "an independent freeholder, to the State in which he may be domiciled, it should be the policy of such State to conserve this status, and protect him in the homestead thus acquired.

**§ 13. The welfare of the State.**—There can be no question as to the fact that the adoption of a wholesome system of homestead laws is beneficial to the general welfare of the State. And especially is this the case under a republican form of government, where every citizen is called upon to take an active part in shaping the policy of the State. It can hardly be doubted that a citizen who has a material interest in the country, will exercise more care in the selection of competent executive officers than he who has nothing to lose. And this is doubly true in relation to the government of municipal corporations.

**§ 14. Immigration and permanent citizenship.**—It is good policy on the part of the less populous States to hold out inducements sufficiently attractive to secure immigration within their borders, and to retain the emigrants permanently after their arrival. And in no way can this be accomplished more effectually than in holding the *home*, when acquired, sacred as a family altar.

Indeed, the wealth and prosperity of the western and southwestern States of the Union, during the last twenty years, may, in a large measure, be attributed to the generous—and perhaps competitive—provisions made at an early day, by those States, for the protection of all citizens in the enjoyment of an ample homestead. The home once acquired, the citizen ceases to wander, and if he does now and then, it is but to return to his fireside, which the State has preserved for him.



## CHAPTER II.

## CONSTITUTIONALITY OF EXEMPTION LAWS.

**§ 15.** The power of the people of a State in adopting a constitution, or of the legislature in enacting laws exempting property from sale on execution, upon contracts made, or obligations incurred, *subsequent* to the adoption of such constitution, or to the passage of the exemption act, has not been seriously questioned; it is conceded, that the laws existing at the time and place of the making of the contract enter into and form part of the contract, as if they were referred to or incorporated in its terms.<sup>1</sup>

**§ 16.** The validity of constitutions adopted, or of statutes enacted, which exempt property from sale on executions upon judgments obtained, contracts made, or obligations incurred, *prior* to the adoption of the constitution or the enactment of the statute, has been frequently questioned, on the ground that they are in contravention of Sec. 10 of Art. 1 of the Federal Constitution, which provides that: "No State shall pass any law impairing the obligation of contracts."

<sup>1</sup> *McCracken v. Hayward*, 2 Howard 612. The Court said: "The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it was made; these are necessarily referred to in all contracts, and forming part of them as the measure of the obligation to perform them by the one party and the right acquired by the other." *Walker v. Whitehead*, 16 Wallace 314; *Olcott v. Supervisors*, Id. 678.

In the case of *Von Hoffman v. the City of Quincy*, 4 Wallace 550, it was said by the same Court: "It is also settled that the laws *which subsist at the time and place* of the making of a contract, and where it is to be performed, *enter into and form part of it*, as if they were expressly referred to or incorporated in its terms." *Railroad Co. v. McClure*, 10 Wallace 511.



§ 17. It is a well settled rule that the constitution of a State is a "law" within the prohibition of the United States Constitution upon State laws impairing the obligation of contracts.<sup>1</sup> In the case of *Gunn v. Barry*<sup>2</sup> the Supreme Court says: "A State can no more impair an existing contract by a constitutional provision, than by a legislative act; both are within the prohibition of the National Constitution."

§ 18. Upon questions arising upon the construction of the Federal Constitution and laws, the decisions of the Courts of the United States are final and conclusive.<sup>3</sup> The Supreme Court of North Carolina, in the case of *Garnett v. Cheshire*,<sup>4</sup> in speaking of the conflicting decisions of the State and U. S. Supreme Court, says: "We should make haste to conform our decisions to the decisions of the United States Supreme Court, because in all cases within its jurisdiction that is the highest Court, and the proper administration of justice, and the true principles of our government, and the good order of society, and the comity of Courts, require subordination."

§ 19. "A constitution, from its nature, deals in generals, not in detail," said Chief Justice Marshall. "Its framers cannot perceive minute distinctions which arise in the progress of the nation, and therefore confine it to the establishment of broad and general principles."<sup>5</sup>

<sup>1</sup> *Railroad Co. v. McClure*, 10 Wallace 515; *Jefferson Br. Bank v. Skelly*, 1 Black 436.

<sup>2</sup> 15 Wallace 623.

<sup>3</sup> *Cusio v. Douglas*, 3 Kansas 123; *Hicks v. Hotchkiss*, 7 John. Ch. 297; *Rosier v. Hale*, 10 Iowa 484; *Garrett v. Chesire*, 69 N. C. 399; *Mather v. Bush*, 16 Johns. 233; *People v. Platt*, 17 Johns. 195; *Roosevelt v. Cebra*, 17 Johns. 108; *Matter of Wendell*, 19 Johns. 153; *McCormick v. Pickering*, 4 N. Y. (4 Comst.) 276; *Cochran v. Van Surly*, 20 Wendell 365; *Kunzler v. Kohaus*, 5 Hill (Ct. Errors) 317; *North River Steamboat Co. v. Livingston*, 3 Cowen (Ct. Errors) 713; *Martin v Hunter's Lessee*, 1 Wheaton 304, 334; *Cohens v. Virginia*, 6 Wheaton 264; *Bank of U. S. v. Norton*, 3 Marsh. 423; *Braynard v. Marshall*, 8 Pick. 196; *Spangler's Case*, 11 Mich. 298; *Tarble's Case*, 13 Wall. 397; *Gilpin v. Critchlow*, Sup. Ct. Mass., Am. L. R., March, 1874; *Kanouse v. Martin*, 14 Howard 23, 15 Howard 198.

<sup>4</sup> 69 N. C. 399. *Cooly Const. Lim.*, 3d Ed. 11, 12.

<sup>5</sup> *Bank of the U. S. v. Deveaux*, 5 Cranch 61 to 92.

§ 20. No distinction being made by the Courts between constitutional and statutory exemptions of property from forced sale, so far as they are, or either of them is, held to conflict with the restraint imposed upon the several States by Section 10 of Art. 1 of the Constitution of the United States, we will therefore treat both provisions under the same general heading.

§ 21. Two classes of laws and constitutions have been adopted, upon which this constitutional question has arisen; one by which the debtor's property is declared to be exempt from all debts, judgments, and liens, both old and new; and the other by which it is made exempt from all debts, except *judgments and liens* existing at the time of the adoption of the constitution or of the enactment of the statutes. It is contended on the one hand, that one or both of these classes of constitutional provisions or statutory enactments are in contravention of the constitutional provision above quoted, and on the other hand, that they affect *only the remedy*, and not the right of the creditor, or the obligation of the debtor.

• The discussion of the question renders it necessary that we should consider :

1st. The distinction between the *obligation* of a contract and the *remedy*, and,

2d. How far each of these classes of constitutional provisions or statutory enactments impairs the one or the other.

• § 22. The obligation of a contract is defined by Bouvier as "a legal not a mere moral obligation, it is the law which binds the party to perform his undertaking. The obligation does not inhere or subsist in the contract itself *proprio vigore*, but in the law applicable to the contract."<sup>1</sup> And Chief Justice Marshall said :<sup>2</sup> "A contract is an agreement in which a party undertakes to do or not to do a particular thing. The law binds him to perform his undertaking, and this is of course the obligation of his contract.

<sup>1</sup> Bouv. L. Dic. 607.

<sup>2</sup> *Sturges v. Crowninshield*, 4 Wheaton 197.

\* \* Any law which releases a part of this obligation must in the literal sense of the word impair it, which makes it totally invalid and entirely discharges it."

"A perfect right is that which is accompanied by the right of compelling those who refuse to fulfill the correspondent obligation. A perfect obligation is that which gives to the opposite party the right of compulsion." <sup>1</sup>

**§ 23. The distinction attempted to be drawn at an early date between the obligation of a contract and the remedy has been prolific of litigation, and has resulted in decisions as various, almost, as the States in the Union. "No attempt has been made to fix definitely the line between alterations of the remedy which are deemed legitimate and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances." <sup>2</sup>**

In *Von Hoffman v. Quincy*,<sup>3</sup> decided in 1866, in speaking of the distinction between the obligation of the contract and the remedy, the Court uses the following language: "The doctrines upon that subject, by the latest adjudications of this Court, render the distinction one rather of form than substance. A right without a remedy is as if it were not. For every beneficial purpose it may be said not to exist. A different result would leave nothing of the contract but an abstract right of no practical value, and render the protection of the constitution a shadow and a delusion. Nothing can be more material to the obligation of a contract than the means of enforcement. Without the remedy, the contract may, indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those social duties which depend for their fulfillment wholly upon the will of the individual. The idea of validity and remedy are inseparable, and both are parts of the obligation, which is guaranteed by the constitution against invasion."

In the still later case of *Walker v. Whitehead*,<sup>4</sup> decided in

<sup>1</sup> Vattel 62.

<sup>2</sup> *Bronson v. Kinzie*, 1 Howard 316 and 317.

<sup>3</sup> 4 Wallace 553.

<sup>4</sup> 16 Wallace 314.

1872, the same Court says: "The laws which exist at the time of making the contract, and in the place where it is made, and to be performed, enter into and make part of it. This embraces those laws which alike affect its validity, construction, discharge, and enforcement. The remedy or means of enforcing a contract is a part of the obligation of that contract which the constitution protects against being impaired by any law passed by a State."

**§ 24. Change of remedy not unconstitutional.**—Such being the obligation of a contract it will be seen that a statute which changes or affects the remedy merely, and does not destroy or impair vested rights, is not unconstitutional even though it be retrospective, and although in changing or affecting the remedy, the rights of parties may be incidently affected. A change of remedy is open to no constitutional objection, provided a substantial remedy is left.<sup>1</sup> The obligation of a contract, and the remedy to enforce it, are distinct things. The one arises at the time the contract is made, the other on the failure to perform it.<sup>2</sup> Thus in relation to exemption laws, it is held that they are not unconstitutional on the ground of impairing the obligation of contracts; though exempting property from execution for debts contracted before the passage of the law,<sup>3</sup> on the ground that it relates to the remedy only, and is not an abuse of the well established power of the State to regulate remedies.<sup>4</sup>

Mr. Justice Cooley in his *Constitutional Limitations*<sup>5</sup> says, in speaking of the laws under consideration, "Nor is there any constitutional objection to such a modification of those laws which exempt certain portions of a debtor's property from execution as shall increase the exemption, nor the

<sup>1</sup> *Richmond v. Richmond, etc., R. R. Co.*, 21 Gratt. 611.

<sup>2</sup> *Rich v. Flanders*, 39 N. H. 304; *Newton v. Tibbatts*, 2 Eng. 7 Ark. 150; *Bronson v. Newberry*, 2 Douglas (Mich.) 38; *Rockwell v. Hubbell*, 2 Douglas (Mich.) 197; *Bronson v. Kinzie*, 1 Howard 311; *Sprecker v. Wakeley*, 11 Wis. 432; *U. S. v. Conway* and *U. S. v. Sampersac*, 1 Hemp. 313 and 118.

<sup>3</sup> *Stephenson v. Osborne*, 41 Miss. 119.

<sup>4</sup> *Grimes v. Byrne*, 2 Min. 89.

<sup>5</sup> *Cooley's Con. Lim.* p. 287.

modifications being made applicable to contracts previously entered into" \* \* "Regulations of this character have always been considered in every civilized community, as properly *belonging* to the *remedy* to be exercised or not by every sovereignty, according to its own views of policy and humanity."<sup>1</sup> In the case of *Von Hoffman v. The City of Quincy*,<sup>2</sup> the Court says: "It is competent for the State to change the form of the *remedy* or to modify it otherwise as they may see fit, provided no substantial right secured by the contract is thereby impaired." \* \* \* "They may also exempt from sale under execution the necessary implements of agriculture, the tools of a mechanic, and articles of necessity in household furniture."<sup>3</sup> In *Bronson v. Kinzie*,<sup>4</sup> Taney, C. J., said the same thing, adding that "it must reside in every State to enable it to secure its citizens from unjust and harassing litigation, and to protect them in those pursuits which are necessary to the existence and well-being of every community." Woodbury, J. in delivering the opinion of the Court, in the case of *Planter's Bank v. Sharpe*,<sup>5</sup> enumerated exemption laws among the examples of legislation which might be constitutionally applied to existing contracts, to secure citizens the "necessaries and comforts of life."

**§ 25. A State has the right to change the remedy, but not the contract.**—The distinction between the obligation of a contract and the "*remedy*" for its enforcement is well established by the authorities; and while the legislature has no right to impair the obligation of the contract, it has the undoubted right to change, modify, or vary the nature and extent of the remedy, provided a substantial remedy is left the creditor. Under the United States Constitution the former power is denied to the several States, but the latter exists in

<sup>1</sup> *Bronson v. Kenzie*, 1 Howard 311; *Rockwell v. Hubbells*, adm., 2 Douglas (Mich.) 197; *Quackenbush v. Danks*, 1 Denio 128, 3 Denio 594, and 1 N. Y. 129; *Sprecker v. Wakeley*, 11 Wis. 432; *Morse v. Goold*, 11 N. Y. 281; *Cusic v. Douglas*, 3 Kansas 123; *Maxey v. Loyal*, 38 Ga. 531; *Hardeman v. Downer*, 39 Ga. 425.

<sup>2</sup> *Von Hoffman v. Quincy*, 4 Wallace 553.

<sup>3</sup> *Id.* 555.

<sup>4</sup> 1 Howard 311; *Sneider v. Heidelberger*, 45 Ala. 126.

<sup>5</sup> 6 Howard 301.

full force.<sup>1</sup> The United States Supreme Court says :<sup>2</sup> “ One of the tests that a contract has been impaired is that its value has, by legislation, been diminished.” In commenting on the foregoing remarks the Court in another case further said: “ This has *reference* to legislation which affects the contract directly, and not incidentally or only by consequence.”<sup>3</sup> The Court seems to intimate in the foregoing remark, that if the impairment of the contract was done indirectly it would be a valid law. In the later cases the Court modifies the broadness of this language.<sup>4</sup>

**§ 26. The constitutionality of the exemption law of the State of New York**, passed in 1842, was before the Supreme Court in 1845, in the case of *Quackenbush v. Danks*, upon a judgment docketed in 1837. An *alias fieri facias* was issued in 1843 on the judgment. The Court was of opinion that statutes which are not made expressly retroactive in terms, should not be construed to affect past transactions, so it would appear that the Exemption Act of 1842 ought not to affect executions for debts contracted before its passage. But the Court intimated that the general words in which the law was framed were broad enough to include contracts already in existence, and that if the statute admitted of that construction, it conflicted with the provisions of the Constitution of the United States forbidding any State to pass a law impairing the obligation of contracts, and was so far void.

<sup>1</sup> *Cutts v. Hardee*, 38 Ga. 350 ; *Phill. (N. C.) L.* 410 ; *Coosa River Steamboat Co. v. Barclay*, 30 Ala. 120 ; *Stocking v. Hunt*, 3 Den. (N. Y.) 274 ; *McLaren v. Pennington*, 1 Paige 102 ; *Miller v. Moore*, 1 E. D. Smith 739 ; *Sullivan v. Brewster*, Id. 681, to same effect ; *Thornton v. Hooper*, 14 Cal. 9 ; *Paschal v. Perez*, 7 Texas 348 ; *Sutherland v. De Leon*, 1 Texas 250 ; *Catlin v. Munger*, 1 Texas 598.

<sup>2</sup> *Von Hoffman v. Quincy*, 4 Wallace 553.

<sup>3</sup> *Burr v. Houghton*, 9 Peters 359 ; *Ogden v. Saunders*, 12 Wheaton 230 and 270 ; *Mason v. Haile*, 12 Wheaton 373 ; *Sturges v. Crowninshield*, 4 Wheaton 200 ; *Bumgardner v. Circuit Court*, 4 Mo. 50 ; *Trapley v. Hamer*, 9 S. & M. 310 ; *Quackenbush v. Danks*, 1 Denio 128 ; *Evans v. Montgomery*, 4 W. and S., (Penn.) 218 ; *Holloway v. Sherman*, 12 Iowa 282 ; *Sprecker v. Wakeley*, 11 Wis. 432 ; *Smith v. Packard*, 12 Wis. 371 ; *Porter v. Mariner*, 50 Mo. 364 ; *Morse v. Goold*, 11 N. Y. 281 ; *Penrose v. Erie Canal Company*, 56 Penn. 46 ; 26 Ark. 527.

<sup>4</sup> *Gunn v. Barry*, 15 Wallace 623 ; *Walker v. Whitehead*, 16 Wallace 314.

The case was taken up to the Court of Appeals, and the judgment of the Supreme Court in so far as it determined that the act was unconstitutional and void as to debts contracted before its passage, was affirmed, the Court being equally divided.<sup>1</sup>

§ 27. The same point, as to the constitutional validity of the exemption law of 1842, so far as it affected prior judgments, was again presented to the Court of Appeals in *Morse v. Goold*.<sup>2</sup> In this case the Court, after declining to regard *Danks v. Quackenbush*, *supra*, as a binding precedent, because the members of the Court had been equally divided in opinion in that case, overruled it: Holding that the act exempting certain property from levy and sale on execution<sup>3</sup> applied to judgments and executions on debts contracted before as well as after its passage; that the act merely modified the remedy for enforcing contracts, and neither destroyed it, nor materially impaired its efficiency; that therefore the act did not conflict with the provision in the Constitution of the United States now under consideration.

Said DENIO, J.: "The contracting of a debt does not in any legal sense create a lien upon the debtor's property. He is as much at liberty to deal with it and transfer it *bona fide* as though he were entirely free from debt. The right which a creditor by becoming such acquires, is to have the use and benefit of the laws for the collection of debts which may be in force, when he shall have occasion to resort to them to enforce his demand against the debtor. \* \* Legal remedies are in the fullest sense under the rightful control of the Legislatures of the several States, notwithstanding the provision in the Federal Constitution securing the inviolability of contracts; and it is not a valid objection to legislation on that subject, that the substantial remedy is less beneficial to the creditor than the one which obtained at the time that the debt was contracted. That this principle is a sound one, I cannot entertain the slightest doubt. Such legislation must of necessity belong to the States, for it is certain that it is not

<sup>1</sup> *Danks v. Quackenbush*, 1 N. Y. (1 Comst.) 129.

<sup>2</sup> 11 N. Y. 281.

<sup>3</sup> Stat. 1842, 193.



embraced within any of the grants of powers to the general government, and in the nature of things can only be exercised by the State sovereignties. \* \* There is no universal principle of law that every part of the property of the debtor is liable to be seized for the payment of a judgment against him. The propriety of exempting articles of small value \* \* was engrafted upon the law of the State before the revision of 1813, and the list of exempt articles has been from time to time increased down to the passage of the Act of 1842 ; but the great mass of individual property always has been and still is liable to the claim of creditors. According to the opinion of the Supreme Court, each of these acts ought to have been limited to future contracts, and until the prior cases had been disposed of there must have been two kinds of executions, one embracing and the other excepting the exempt property ; for however trifling and unimportant it might be, the provision releasing it from the execution is considered to that extent a violation of all prior contracts of the debtor, which as already remarked is quite erroneous. When it is remembered that this right, so far as it is protected by the Constitution of the United States, is limited to the benefit of the general laws of the State for the collection of debts, and to the continuance of such laws in substance and with good faith, it seems clear that any change which the policy or humanity of the Legislature may make, which shall leave a substantial remedy, does not touch the obligation of prior contracts within the meaning of the constitution. The regulation prescribed by the Act of 1842 is a general one. It professes to give the rule according to which during all future time the rights of creditors are to be enforced ; and it is not made to embrace past transactions because there is any motive for relieving existing debtors, but in order that the course of legal procedure should be uniform. \* \* The question is, whether the law which prevailed when the contract was made, has been so far changed that there does not remain a substantial mode of enforcing it in the ordinary and regular course of justice. \* \* I regard the Act of 1842 as a provision clearly within the competency of the Legislature,



and one which they might lawfully apply to all future proceedings in Courts, whether such proceedings should relate to existing or future causes of action."<sup>1</sup>

§ 28. We have thought proper to incorporate a large portion of the foregoing opinion in our text for the reason, that it is a well considered case, laying down general principles which are well sustained by the ablest decisions, both before and since its rendition, and the principles then announced have been generally followed and may now be said to furnish the rule.

It will have been noticed that it establishes the following principles :

1st. That all legal remedies are properly, and in the nature of things must from necessity be, under the control of the State.

2d. That the general government can only exercise the specific powers granted her by the people, all others being reserved to the sovereignties ; and that this remedial right is one of the reserved.

3d. That a State law furnishing a substantial remedy—although it may not be as speedy and efficacious as the remedy existing when the debt may have been contracted—is within the constitutional restraint imposed by the people of the several States upon themselves, in the grant of powers to the general government.

4th. That the creditor is entitled, only, to the use and assistance of the process of the law, for the collection of his debt, which may be in force in the State when he calls upon her to enforce his demand.

5th. That there is a marked distinction as to the right, between a simple indebtedness and a lien—a vested right.<sup>2</sup>

<sup>1</sup> 11 N. Y. 291, citing: 4 Wheaton, 122, 200; 12 Wheaton, 370; 9 Pet. U. S. 828; 5 Pet. 457; 5 How. (U. S.) 316; 2 Kent 397; 21 Pick. 169; 2d Story on Const. 251 and 268; 22 Pick. 430; 8 Mass. 423 and 428, distinguishing, 1 Howard 411 and 2 Howard 608.

<sup>2</sup> The following cases sustain the principles announced: *Bronson v. Kinzie*, per Taney, Ch. J., 1 Howard 316; *Stocking v. Hunt*, 3 Denio 274; *Vanbaumbach v. Bade*, 9 Wis. 578; *McCracken v. Hayward*, 2 Howard 612; *Butler v. Palmer*, 1 Hill 324; *Van Rensselaer v. Snyder*, 9 Barb. 302, 13 N. Y. 299; *Con-*

**§ 29. The Constitution of the United States applies only to the stipulations of the contract.**—The constitutional provision in relation to laws impairing the obligation of contracts, was designed to operate only upon some of the undertakings contained in the contract, and was not intended to interfere with the internal regulations which a State may think proper to adopt for the government of its citizens.<sup>1</sup> Thus, it was held by the Supreme Court of the United States, in the case of *Calder v. Bull*,<sup>2</sup> that a resolution or law of the Legislature of Connecticut, setting aside a decree of a Court and granting a new trial to be had before the same Court, was not constitutionally objectionable.

**§ 30. Suits pending may be affected by change of remedy** without contravening the Constitution of the United States. An attachment of property contemporaneous with the commencement of a suit, is not such a vested right as will prohibit legislation taking away the right to further prosecute the suit in the form in which it was commenced. So a State may modify, or take away, remedies for the recovery of debts.<sup>3</sup> It was held in Minnesota that a law passed subsequent to the making of a mortgage, which so changed the law as to allow the mortgagor to retain possession till the

*key v. Hart*, 14 N. Y. 22; *Guild v. Rogers*, 8 Barbour 502; *Story v. Furman*, 25 N. Y. 214; *Coriell v. Ham*, 4 Greene (Iowa) 455; *Heyward v. Judd*, 4 Minn. 483; *Swift v. Fletcher*, 6 Minn. 550; *Maynes v. Moore*, 16 Ind. 116; *Smith v. Packard*, 12 Wis. 371; *Grosvenor v. Chesley*, 48 Me. 369; *Paschal v. Perez*, 7 Texas 365; *Auld v. Butcher*, 2 Kansas 155; *Kenyon v. Stewart*, 44 Penn. St. 179; *Clark v. Martin*, 49 Penn. St. 299; *Sanders v. Hillsborough Ins. Co.*, 44 N. H. 238; *Huntzinger v. Brock*, 3 Grant's Penn. Cases 243; *Mechanics Bank's Appeal*, 31 Conn. 63; *Ogden v. Saunders*, 12 Wheaton 270; *Beers v. Haughton*, 9 Peters 359; *Bumgardner v. Circuit Court*, 4 Mo. 50; *Trapley v. Hamer*, 9 Smed. & M. 310; *Bronson v. Newberry*, 2 Doug. Mich. 38; *Rockwell v. Hubbell Adm.*, 2 Doug. Mich. 197; *Evens v. Montgomery*, 4 W. & S. 218; *Holloway v. Sherman*, 12 Iowa 282; *Sprecker v. Wakeley*, 11 Wis. 432; *Porter v. Mariner*, 50 Mo. 364; *Penrose v. the Erie Canal Co.*, 56 Penn. St., 46; 1 Denio, 128, 3 Denio 594, 1 N. Y. 129, 6 Barbour S. Ct. 327.

<sup>1</sup> *Barlow v. Gregory*, 31 Conn. 264.

<sup>2</sup> 3 Dall. 386.

<sup>3</sup> *Read v. Frankfort Bank*, 23 Maine 318; *U. S. Bank v. Longworth*, 1 McLean (U. S.) 35; *Woods v. Buie*, 5 Howard (Miss.) 285; *Evans v. Montgomery*, 4 Watts & Serg. 218; *Oriental Bank v. Freeze*, 18 Maine 109.

expiration of the period of redemption, which was one year, applied to a mortgage made before the passage of the act, though the law, at the time the mortgage was executed, entitled the purchaser at foreclosure sale to immediate possession, and that such change in the law did not impair the obligation of the contract.<sup>1</sup>

**§ 31. Execution laws in force at the time of a contract** enter into it, so far as they affect the obligation of contracts ; but so far as laws are merely remedial, they may be changed at any subsequent time, and the new law will govern the remedy on the contract.<sup>2</sup> The general rule is, that, "the right to a particular remedy is not a vested right ; and the exceptions are of those peculiar cases in which the remedy is a part of the right itself."<sup>3</sup> An act granting a stay of execution, in Pennsylvania, under certain conditions on "all judgments or debts upon which stay of execution has been or may be waived by the debtor in any original obligation or contract upon which such judgment has been or may be hereafter obtained " was held to be unconstitutional, being in conflict with § 10, Art. 1, of the Constitution of the U. S.<sup>4</sup> Such acts were also held unconstitutional so far as they were attempted to be applied to judgments rendered before their passage.<sup>5</sup>

**§ 32. The State cannot abolish the remedy or injuriously change it**, although it may modify it by subsequent statute, yet a statute which takes away all remedy impairs its obligation.<sup>6</sup> "A vested right of action is property in the

<sup>1</sup> *Berthold v. Holman*, 12 Minn. 335 ; *Webb v. Moore*, 25 Ind. 4 ; *Grosvenor v. Chesley*, 48 Maine 369.

<sup>2</sup> *Coriell v. Ham*, 4 Green 458 ; *Holloway v. Sherman*, 12 Iowa 282 ; *Heyward v. Judd*, 4 Min. 488 ; *Stone v. Bassett*, 4 Min. 298 ; *Van Rensselaer v. Hays*, 19 N. Y. 68 ; *Van Rensselaer v. Ball*, Id. 100 ; *Ralston v. Lothian*, 18 Ind. 303 ; *Smith v. Packard*, 12 Wis. 371.

<sup>3</sup> *Cooly Con. Lim.* 261 ; *Rosier v. Hale*, 10 Iowa 484 ; Review of all cases pro and con in the case of *Rosier v. Hale*, 10 Iowa ; *Smith v. Bryan*, 34 Ill. 377 ; *Lord v. Chadbourne*, 42 Me. 429 ; *McCormick v. Rusch*, 15 Iowa 127.

<sup>4</sup> *Bellmyer v. Evans*, 40 Penn. 324.

<sup>5</sup> *Iglehart v. Wolfen*, 20 Ind. 32 ; *Scobey v. Gibson*, 17 Ind. 572 ; *Stevens v. Andrews*, 31 Mo. 205.

<sup>6</sup> *Bruce v. Schuyler*, 4 Gilm. 8 Ill. 241 ; *Cornell v. Hichens*, 11 Wis. 367 ; *Maltby v. Cooper*, 1 Morris (Iowa) 59 ; *Harlan v. Sigler*, 1 Morris (Iowa) 39 ; *Hill v. Kessler*, 63 N. C. 439 ; *Garrett v. Chesire*, 69 N. C. 402.

same sense in which tangible things are property, and is protected." <sup>1</sup>

The suspension by statute of remedies, or any part thereof, existing when the contract was made, more or less impairs the obligation of the contract, and is unconstitutional. <sup>2</sup>

**§ 33. Distinction between liens and simple indebtedness.**—In the case of *Hill v. Kessler*,<sup>3</sup> the Supreme Court, upon the question whether the provisions of the constitution of N. C., Art. X, §§ 1 and 2, exempting certain property from execution sale, impairs the obligation of pre-existing contracts, decided that the exemption of a homestead of \$1,000 and of personal property worth \$500 applies to debts existing before the adoption of the constitution. Holding that homestead and exemption laws apply to debts—mere indebtedness—existing before the adoption of the constitution of 1868. Debts not being a lien upon the property of a debtor. But decided otherwise where specific liens were created.

In the case of *McKeithan v. Terry*,<sup>4</sup> the execution was levied before the adoption of the constitution, and the Court *held* that there was a specific lien, a vested right, which it was not the purpose of the constitution to destroy, "if, indeed, it had the power." Specific liens created before the adoption of the constitution are not divested by the provision for a homestead in it."

A late case in North Carolina,<sup>5</sup> in which the Court reviews the recent case decided by the Supreme Court of the United States<sup>6</sup> in relation to the exemption laws of Georgia, as well as the cases in its own Court, affirms that the homestead laws of North Carolina do not impair the obligation of a contract, and are not unconstitutional.

<sup>1</sup> *Cooly's Con. Lim.* 361; *Cornell v. Hichens*, 11 Wis. 353; *Oriental Bank v. Freeze*, 18 Maine 109; *Woodruff v. The State*, 3 Ark. 285; *Bishop's Fund v. Rider*, 13 Conn. 87; *Read v. Frankfort Bank*, 10 Shep. (23 Maine) 318.

<sup>2</sup> *Thorne v. San Francisco*, 4 Cal. 127; *Winter v. Jones*, 10 Ga. 190; *Mundy v. Monroe*, 1 Mich. 68.

<sup>3</sup> 63 N. C. 437.

<sup>4</sup> *McKeithan v. Terry*, 64 N. C. 25.

<sup>5</sup> *Garrett v. Chesire*, 69 N. C. 396.

<sup>6</sup> *Gunn v. Barry*, 15 Wallace 610.

**§ 34. General indebtedness does not affect homestead.** The Constitution of Minnesota contains the following clause : “ A reasonable amount of property shall be exempt from seizure or sale, for the payment of any debt or liability : the amount of such exemption shall be determined by law.”<sup>1</sup>

Accordingly, in 1851, the Legislature passed the Homestead Exemption Law, which was amended in 1854. The Supreme Court said,<sup>2</sup> in speaking of these acts, that it was “ evident that the intention of the Legislature was to exempt from sale on execution or other process of a Court this homestead as against any general indebtedness that the owner might incur, not connected with the land itself, or the improvements thereon, or liens voluntarily created by mortgage.”

**§ 35. Specific indebtedness merged in a lien affects homestead.**—The fact that premises became a homestead after a lien has attached, cannot deprive the lien claimant of his lien. And a “ lien claimant having a lien older than the homestead right, may enforce his lien without any reference to such homestead right, and in such case the homestead tenant will not be permitted to select land which he regards as his homestead, in such a manner as to interfere with the enforcement of the lien. And such liens are assignable.”<sup>3</sup>

So in Wisconsin it was held that the statute which provides<sup>4</sup> “ that the owner of a homestead may remove therefrom, or sell and convey the same, and such removal or sale and conveyance shall not render such homestead subject to forced sale on execution or other final process hereafter issued on any judgment ” does not apply to executions issued on judgments which had become liens prior to the passage of the law.<sup>5</sup> In the case of *Hoyt v. Howe*<sup>6</sup> the Court held that the judgment of a Court of Record being a lien upon all the

<sup>1</sup> *Cogel v. Mickow*, 11 Minn. 477.

<sup>2</sup> *Olson v. Nelson*, 3 Minn. 58.

<sup>3</sup> *Tuttle v. Howe*, 14 Minn. 151.

<sup>4</sup> General Laws 1858, Chap. 137, R. S. 798.

<sup>5</sup> *Seamans v. Carter*, 15 Wis. 548; *Dopp v. Albee*, 17 Wis. 590; *Cusio v. Douglas*, 3 Kansas 123; *Baltimore A. C. v. Schell*, 17 Wis. 308.

<sup>6</sup> *Hoyt v. Howe*, 3 Wis. 660 [752]; *Folsom v. Carli*, 5 Minn. 333; *Tillotson v. Millard*, 7 Minn. 513.

real estate of the judgment debtor, "the homestead of the debtor, as constituting a part of his real estate, is subject to such lien, but that the homestead premises are exempted from forced sale as long as they remain the actual homestead of the judgment debtor. But that when the homestead ceases to be occupied as such, by his voluntary act, as by alienation, or otherwise, the lien of judgment then comes into effect and may be enforced."

In the State of Kansas, it was held in the case of *Cusic v. Douglas*,<sup>1</sup> that the first section of the schedule to the constitution of that State does not exempt a judgment rendered prior to the adoption of the constitution from the operation of the homestead exemption clause. It was argued on behalf of the judgment creditor, that the exemption clause in the State constitution was in contravention of the Constitution of the United States as impairing the obligation of contracts. But the Court held—on the authority of *Bronson v. Kinzie*<sup>2</sup>—that the argument was not well founded. Holding that there was a clear recognition by the Supreme Court of the United States in the foregoing case, of the power of the State to take away from the creditor his right to subject a portion of the debtor's property to the satisfaction of his debt. But the doctrine was not predicated upon any admission of the power of the Legislature to impair the obligation of the contract, but proceeded rather upon the theory that such legislation applies to the remedy, and that the power to change it extends to such modifications as sound policy and the well-being of the community shall dictate.

**§ 36. "State Legislatures have the unquestionable right to pass laws which operate to control and modify the express or implied provisions of contracts. It is only when they impair the obligation of the contract that the validity of their acts may be called in question." "The true question is whether the obligation of the contract is impaired either by the law operating upon it directly, or by its operations upon the remedy in such a manner as to essentially impair and**

<sup>1</sup> 3 Kansas 123.

<sup>2</sup> 1 Howard 311.

take away the right of the party to enforce the obligation. It is not enough that the remedy is changed and rendered less speedy and convenient. If there is still a substantial remedy left to enable the party to enforce his rights, that is enough."<sup>1</sup>

**§ 37. But as to the contract itself,** the binding force and coercive power of the law applicable to the contract, as the same existed at the time it was made, constitutes the obligation of the contract. Any subsequent act of the Legislature, therefore, remedial or otherwise, which alters or changes the then existing law which created and defined that legal obligation to such an extent as to make its legal force and power less binding upon the defendant to perform it, obstructing its enforcement or imposing conditions for its performance not prescribed by the law which created and defined that legal obligation at the time the contract was made, necessarily impairs it, and is prohibited by the Constitution.<sup>2</sup> A law made after the existence of a contract which alters the terms of it, by rendering it less beneficial to the creditor, or by defeating any of the terms upon which the parties had agreed, impairs its obligation, within the meaning of the Constitution of the United States.<sup>3</sup>

**§ 38. Rights of property** depend on a legal and judicial construction of the statute existing when they vest, not on a legislative construction by a subsequent declaratory act.<sup>4</sup> The Legislature have the power to take away by statute what was given by statute, but not so as to disturb vested rights already vested under the former law.<sup>5</sup> So, in Califor-

<sup>1</sup> James v. Stull, 9 Barb. 485.

<sup>2</sup> Aycock v. Martin, 37 Ga. 124.

<sup>3</sup> Blanchard v. Russell, 13 Mass. 1, 16; King v. Dedham Bank, 15 Mass. 447, sustaining the same principle; Babcock v. Middleton, 20 Cal. 644; Tuolumne Co. v. Sedgwick, 15 Cal. 515; McCauley v. Brooks, 16 Cal. 11; Montgomery v. Kasson, 16 Cal. 189; Grogan v. San Francisco, 18 Cal. 590; Conant v. Van Schaick, 24 Barb. (N. Y.) 87; Maysville Turnpike Co. v. How, 14 B. Mon. (Ky.) 342; Damman v. Com. of School Lands, 4 Wis. 414.

<sup>4</sup> Hunt v. Hunt, 37 Maine (2 Heath) 339.

<sup>5</sup> Oriental Bank v. Freeze, 6 Shep. 18 Maine 109; Woodruff v. The State, 3 Arkansas 285; Bishop's Fund v. Rider, 13 Conn. 87; Read v. Frankfort Bank, 10 Shep. 23 Me. 318.



nia it was said that an act denying the right of sale for the enforcement of the contract, "would probably be such a vital assault upon the obligation as to practically destroy it, and therefore would be unconstitutional." "But a repeal of a right of redemption—in other words, an act making a sale absolute instead of conditional—would not impair the contract."<sup>1</sup> The same Court held in the case of the *People v. Woods*,<sup>2</sup> that the Act of 1851 to fund the indebtedness of San Francisco amounted to a new contract with creditors, and that the act could not be materially altered to their disadvantage; that therefore the Consolidation Act of 1856, § 95, was unconstitutional. The lawful repeal of a statute cannot be constitutionally made to destroy contracts which have been entered into under it, but being legal when made, they remain valid notwithstanding the repeal.<sup>3</sup>

**§ 39. A contract, when complete, no new conditions can be incorporated.**—The lien of a bondholder who has loaned money to a State, on the pledge of certain property by its legislature, cannot be divested or postponed by a subsequent act of such legislature. Such bondholder is protected by the clause of the Constitution of the United States, which forbids a State to pass a law impairing the obligation of contracts.<sup>4</sup> In the case of *Robinson v. Magee*,<sup>5</sup> the Supreme Court of California held, that an act of the Legislature passed in 1855, declaring the pre-existing claims of creditors forever barred if they failed to present the same for registry by a certain time, impaired the obligation of the contract,

<sup>1</sup> *Tuolumne Redemption Co. v. Sedgwick*, 15 Cal. 515.

<sup>2</sup> *Tallant v. Woods*, 7 Cal. 579; *Catlin v. Munger*, 1 Texas 598; *Sutherland v. Deleon*, 1 Texas 250.

<sup>3</sup> 15 Cal. 515; *McCauley v. Brooks*, 16 Cal. 11; *Southard v. Central R. R. Co.*, 2 Dutch. N. J. 13; *People v. Auditor-General*, 9 Mich. 327; *Montgomery v. Kason*, 16 Cal. 189; *Adams v. Palmer*, 51 Maine 480; *Commonwealth v. New Bedford Bridge*, 2 Grey 339; *State v. Phalan*, 3 Harrington 441; *State v. Hawthorn*, 9 Mo. 389.

<sup>4</sup> *Wabash Co. v. Beers*, 2 Black (U. S.) 448.

<sup>5</sup> *Robinson v. Magee*, 9 Cal. 81; *Winter v. Jones*, 10 Ga. 190. To the same effect as to principle: *State v. Crittenden County Court*, 19 Ark. 360; *Thorne v. San Francisco*, 4 Cal. 127; *Winter v. Jones*, 10 Ga. 190; *Mundy v. Monroe*, 1 Mich. 68.



and was therefore void. “After the contract is once complete it impairs its obligations to impose new conditions, and this the constitution prohibits.” \* \* “Any provision of the statute substantially defeating the end contemplated by the parties to the contract must impair its obligation. This obligation must depend upon the law as it was when the contract was made ; the legislature cannot, therefore, by a subsequent act impair its obligations, by requiring the performance of other conditions not required by the law of the contract.”

· **§ 40. Change of constitution, no effect on prior contract.**—Nor can a State, by a change of constitution, be released from a contract made under a former constitution which authorized it to be made.<sup>1</sup>

Where the new constitution of Ohio contained a clause to the effect, that “the General Assembly shall never authorize any county, town, or township, by vote of its citizens, or otherwise, to become a stockholder in any joint stock company, corporation, or association,” it was held, in the case of *Cass v. Dillon*,<sup>2</sup> that a law enacted before the adoption of the new constitution authorizing such subscription was not repealed by implication, as the new clause referred to future laws.<sup>3</sup>

**§ 41. The contract designed to be protected by Constitution of the United States.**—The Supreme Court of the United States has said, in the case of *Butler et als v. Pennsylvania*,<sup>4</sup> “that the contracts designed to be protected by the tenth section of the first article of the Federal Constitution were “contracts by which perfect rights—certain, definite, fixed, private rights of property—are vested,” as distinguished from rights growing out of measures or engagements adopted or undertaken by the body politic, or State

· <sup>1</sup> *Dodge v. Woolsey*, 18 Howard (U. S.) 331 ; *Mechanics and Traders Bank v. Debolt*, Id. 380 ; *Mechanics and Traders Bank v. Thomas*, Id. 384.

<sup>2</sup> *Cass v. Dillon*, Ramsey J. dissenting, 2 Ohio St. 607.

<sup>3</sup> *Sedgwick on Stat. and Con. Law* 490.

<sup>4</sup> 10 Howard 416.

government, for the benefit of all, and which, from the necessity of the case, and according to universal understanding, are to be varied or discontinued as the public good shall require.<sup>1</sup> "And the terms of the clause include as well executory as executed contracts."<sup>2</sup>

In the case of *Howard v. Bugbee*,<sup>3</sup> the Supreme Court held that a statute of the State of Alabama, authorizing a redemption of mortgaged property by *bona fide* creditors of the mortgagor, in two years after the sale under a decree, was unconstitutional and void as to sales made under mortgages executed prior to the date of its enactment, as impairing the obligation of the contract.

So an act of the legislature of New Jersey, declaring that certain lands which should be purchased for the Indians should not hereafter be subject to any tax, constituted a contract which could not be rescinded by a subsequent legislative act. Such repealing act being void under the clause of the Constitution of the United States, which prohibits a State from passing any law impairing the obligation of contracts.<sup>4</sup>

§ 42. With regard to past transactions, the legislature cannot substitute a nugatory remedy for a good one, but they can substitute another good one—parties have a vested right to some remedy substantially as good as the old one, but not to that particular one.<sup>5</sup> A legislature has no right "so to regulate the remedy as that it shall destroy a contract by destroying all means of enforcement. A contract is just as much impaired by a prohibition to sue upon it as by direct legislative action, declaring it void."<sup>6</sup> If a law defeat the end or object contemplated by the contract, the operative force of the obli-

<sup>1</sup> Sedgwick on Stat. and Con. Law 618.

<sup>2</sup> *Fletcher v. Peck*, 6 Cranch 133, 137. Cooley's Con. Lim. 3d Ed. 273, 274.

<sup>3</sup> 24 Howard (U. S.) 461; *Mundy v. Monroe*, 1 Mich. (Mann) 68; same principle in case: *Planters Bank v. Sharp*, 6 Howard (U. S.) 301.

<sup>4</sup> *New Jersey v. Wilson*, 7 Cranch 164, principles announced in the case sustained in *Hardy v. Waltham*, 7 Pick. 110; *Atwater v. Woodbridge*, 6 Conn. 223; *Osborne v. Humphrey*, 7 Conn. 335.

<sup>5</sup> *Thornton v. Hooper*, 14 Cal. 9; *Lockett v. Usry*, 28 Ga. 345.

<sup>6</sup> *Scarborough v. Dugan*, 10 Cal. 305; *Johnson v. Bond*, 1 Hemp. 533; *Coffman v. Bank of Kentucky*, 40 Miss. 29; *Hill v. Boyland*, 40 Miss. 618.

gation of the contract is impaired.<sup>1</sup> Whenever "the legislature so far alters the remedy as to impede, destroy, change, or render the right scarcely worth pursuing, they necessarily impair the obligation of the contract upon which such right was founded, and the act is unconstitutional."<sup>2</sup>

**§ 43. Rights under decree of sale.**—Statutes providing that lands shall not be sold on execution, unless they have been first valued and one-half or two-thirds of the appraised value bid for them, do not apply to a sale or an execution on a decree of foreclosure of a mortgage made before the passage of the statute, and so far as such laws affect pre-existing contracts, they are unconstitutional and void.<sup>3</sup>

Where "a contract provides for the payment of money by one party to another, and, by the law then in force, property would be liable to be seized and sold on execution to the highest bidder, to satisfy any judgment on such contract, a subsequent law forbidding property from being sold on execution for less than two-thirds the value under the appraisal pursuant to the directions contained in the law, though professing to act on the remedy, amounts to a denial or obstruction of the rights accruing by the contract, and is directly obnoxious to the protection of the constitution."<sup>4</sup>

So acts of the legislature, inhibiting actions of ejectment by mortgages before foreclosure, were held to be unconstitutional and void as to mortgages previously executed, because

<sup>1</sup> *Goenen v. Schroeder*, 8 Minn. 387; *De Cordova v. Galveston*, 4 Texas 470; *Tucker v. Burns*, 2 Swan. (Tenn.) 35; *Oatman v. Bond*, 15 Wis. 20; *Soutter v. Madison*, Id. 30; *Parish v. Eager*, Id. 532; *Robinson v. McGee*, 9 Cal. 81; *Smith v. Morse*, 2 Cal. 524; *Curran v. Arkansas*, 15 Howard (U. S.) 304.

<sup>2</sup> *Smith v. Morse*, 2 Cal. 524; *De Cordova v. Galveston*, 4 Texas 470; *Tucker v. Burns*, 2 Swan (Tenn) 35; *Curran v. Arkansas*, 15 Howard (U. S.) 304; *Oatman v. Bond*, 15 Wis. 20, Id. p. 30, Id. p. 532.

<sup>3</sup> *McCracken v. Hayward*, 2 Howard 608; *Gantley's Lessee v. Ewing*, 3 Howard (U. S.) 707; *Falconer v. Campbell*, 2 McLean 195; *Rawley v. Hooker*, 21 Ind. 144; *Willard v. Longstreet*, 2 Douglas (Mich.) 172; *Cargill v. Power*, 1 Mich. 369; *Grimes v. Byrne*, 2 Minn. 97; *Heyward v. Judd*, 4 Minn. 483, Id. 298; *Atkinson v. Duffy*, 16 Minn. 45.

<sup>4</sup> *Cooly*, Con. Lim. 3d Ed. 289, 290; *McCracken v. Hayward*, 2 Howard 608; *Willard v. Longstreet*, 2 Douglas (Mich.) 172; *Rawley v. Hooker*, 21 Ind. 144; *Gantley's Lessee v. Ewing*, 3 How. 707; *Bronson v. Kinzie*, 1 How. 311.

they did not affect the remedy merely, but took away the right of rents and profits, which was a part of the security.<sup>1</sup>

§ 44. Statutes of limitations affect the remedy, not the contract, therefore are held to be constitutional, provided no vested rights are disturbed.<sup>2</sup> And such statutes may be enacted, or modified by the legislature even in respect to previously existing debts, without infringing the constitutional provision relative to contracts.<sup>3</sup> But if statutes of limitations do not allow a reasonable time after the passing thereof, for the commencement of suits on existing causes of action, they are unconstitutional.<sup>4</sup>

§ 45. Retrospective laws which do not impair the obligation of contracts, or partake of the character of ex post facto laws, are not forbidden by any part of the Constitution of the United States.<sup>5</sup> State legislatures may pass retrospective laws, which overstep the line of legislative power granted by their own constitutions. "Acts of these classes, however objectionable, are not within the scope of the restrictions of the Federal Constitution, and give no right of appeal from the decisions of the State" to the Federal tribunals.<sup>6</sup> It is only when such laws impair the obligation of the contract that the restraining power of the Federal Constitution is brought into requisition, or when a right is claimed

<sup>1</sup> *Mundy v. Munroe*, 1 Mich. 68; *Blackwood v. Van Vleet*, 11 Mich. 252; *Cooley Cont. Limitations* 290; *Stevens v. Brown*, Walk Ch. (Mich.) 41.

<sup>2</sup> *Cox v. Berry*, 13 Ga. 306; *Garrett v. Beaumont*, 24 Miss. 377; *Billings v. Hall*, 7 Cal. 1.

<sup>3</sup> *Griffin v. McKenzie*, 7 Ga. 163; *Walker v. Bank of Miss.*, 2 Eng. 7 *Arkansas* 484, 500; *Hawkins v. Campbell*, 1 Eng. (6 Ark.) 513; *Couch v. McKee*, 1 Eng. 6 Ark. 484; *Waltermire v. Westover*, 14 N. Y. 16; *Morse v. Goold*, 11 N. Y. 281.

<sup>4</sup> *Call v. Hagger*, 8 Mass. 429, 430; *Proprietors of the Kennebeck purchase v. Laboree*, 2 Greenl. (Maine) 294; *Society v. Wheeler*, 2 Gall (U. S.) 141; 4 *Wheaton* 207; 3 *Pet.* 290; 1 *Blackf.* 36.

<sup>5</sup> *Satterlee v. Mathewson*, 2 Peters 386; *Sedgwick Stat. and Con.* 192; *Sedgwick Stat. and Con.* 639.

<sup>6</sup> *Calder v. Bull*, 3 Dall. 386; *Satterlee v. Mathewson*, 2 Peters 413; *Charles River Bridge Case*, 11 Peters 538; *Cochran v. Van Surly*, 20 Wend. 379, see Senator Ver Plank's remarks; *Watson v. Mercer*, 8 Peters 110; *Balt. & S. R. R. v. Nesbit*, 10 Howard 401; *East Hartford v. Hartford B. Co.*, Id. 539.

under the Constitution or laws of the United States, relief may be sought by writ of error from the Supreme Court of the United States, when the decision of the State Court is against such right.<sup>1</sup>

**§ 46. Statutes not retrospective in operation unless clearly so intended.**—A statute will not be permitted to have a retrospective operation unless its terms clearly indicate that such operation was intended by the legislature.<sup>2</sup> The Constitution will not permit a right of entry, once vested, to be divested by a subsequent retrospective act of the legislature.<sup>3</sup> So in Ohio it was held that an act operating retrospectively to cure a conveyance made by a married woman, but not executed in the manner required by the statute, was void.<sup>4</sup>

In New York, the act of the legislature, passed April 7th, 1848, for the more effectual protection of the property of married women, so far as it was intended to affect existing rights of property in married persons, whose marriage was prior to the passage of the act, was held to be unconstitutional and void.<sup>5</sup>

The above statute provides that “the real and personal property, and the rents and issues, and profits thereof, of any female now married, shall not be subject to the disposal of her husband, but shall be her sole and separate property, as if she were a single female, except so far as the same may be liable for the debts of the husband heretofore contracted.” It was held in the case of *White v. White*,<sup>6</sup> that this statute was not within the clause of the Constitution of the United States which prohibits the States from passing any law impairing the obligation of contracts, but that so far as the statute relates

<sup>1</sup> *Galpin v. Critchlaw*, Sup. Court, Mass., March, 1874; *Kanouse v. Martin*, 14 Howard 23; *Kanouse v. Martin*, 15 Howard 198.

<sup>2</sup> *Jarvis v. Jarvis*, 3 Edwd. Ch. 490, 465; *Briggs v. Hubbard*, 19 Vt. (4 Wash.) 86; *Head v. Ward*, 1 J. J. Marsh 378, 281; *Plumb v. Sawyer*, 21 Conn. 351; *Thorne v. San Francisco*, 4 Cal. 127; *Von Schmidt v. Huntington*, 1 Cal. 55.

<sup>3</sup> *Southard v. Central R. R. Co.*, 2 Dutch. (N. J.) 13.

<sup>4</sup> *Good v. Zercher*, 12 Ohio 364.

<sup>5</sup> *Holmes v. Holmes*, 4 Barb. 295.

<sup>6</sup> *White v. White*, 5 Barb 474. See the case of *Lawrence v. Miller*, 1 Sandf. 516.

to existing rights of property in married persons was unconstitutional and void under the constitution of the State. So in Pennsylvania, the Act of 1848, supplementary to an Act of 1833, relating to last wills and testaments, was held to be unconstitutional and void, so far as it purported to be retroactive in its effect.<sup>1</sup> In Iowa, the Act of 1860, providing for the redemption of real estate sold on foreclosure, so far as it affected contracts made before its enactment, was held invalid.<sup>2</sup>

The question of the validity of retroactive laws came before the Supreme Court of North Carolina, in the cases of *Hill v. Kessler*,<sup>3</sup> and *Garrett v. Chesire*,<sup>4</sup> in which cases the Court held that such laws were constitutional as to pre-existing liabilities, but conceded that if such exemption laws, retroactive in effect, impaired the obligation of a contract, "either expressly or by implication, they were against the Constitution of the United States, and would therefore be void." In the case of *Charless v. Lamberson*,<sup>5</sup> the Supreme Court of Iowa decided that where the defendant in 1848 purchased the premises in controversy; in the spring of 1851 commenced building thereon, and on the 9th of July following, moved into the building, and continued to reside therein; and when on the 3d of February, 1852, the plaintiff recovered judgment against the defendant on a contract made in April, 1851, issued execution under which he purchased the property, and obtained the sheriff's deed in 1853. *Held*, 1st, That the defendant not having occupied the premises while the Act of 1849, in relation to homesteads, was in force, the said premises were not exempt from forced sale, as a homestead under the act.<sup>6</sup> 2d, That the contract on which the judgment was rendered, having been made prior to the code taking effect, the premises were not exempt, as a homestead, under the code.

**§ 47. Retrospective laws of Georgia.**—A rule adverse to the principles laid down in the forgoing cases has obtained

<sup>1</sup> *Greenough v. Greenough*, 11 Penn. St. 489.

<sup>2</sup> *Molony v. Fortune*, 14 Iowa 417.

<sup>3</sup> 63 N. C. 437. See *McKeithan v. Terry*, 64 N. C. 25, and *Sluder v. Rogers*, Id. 289.

<sup>4</sup> 69 N. C. 396.

<sup>5</sup> 1 Iowa 442.

<sup>6</sup> Occupation of premises was a pre-requisite of the statute before declaration.

in the State of Georgia. The Supreme Court of that State had uniformly held that a homestead is not subject to the payment of a judgment obtained prior to the passage of the homestead law, which does not fall within one of the exceptions<sup>1</sup> mentioned in the Act of 1868.<sup>2</sup> But upon appeal from such decisions to the United States Supreme Court, the latter Court has in each case reversed such decisions; holding that such retroactive laws do impair the obligation of a contract, and are within the inhibitory clause of the Constitution of the United States.<sup>3</sup> In the case of *Hardeman v. Downer*,<sup>4</sup> the Georgia Court said that when homestead and exemption laws were made in good faith to secure the family of insolvent debtors a reasonable means of subsistence from the debtor's property, they do not, "even though retroactive, fall within the prohibition of Sec. 10 of Art. 1 of the Constitution of the United States, declaring that no State shall pass any law impairing the obligation of a contract." "The homestead provision of the constitution of 1868 is retroactive, and applies to judgments,<sup>5</sup> executions, and decrees, founded on debts contracted before its adoption, even though reduced to judgment before that time, and is without exception, save as therein provided. The Constitution of the United States does not prohibit a State from divesting a vested right, except when that right is vested by virtue of and under a contract of the parties. A creditor under an ordinary contract acquires no vested right in the property of his debtor, and it is within the powers of a State to declare which of the claimants against an insolvent debtor—a stranger or his wife and family, who by law have a legal right to a support from him—shall have the preference."

1 The exceptions are taxes, money loaned or expended in improvements of the homestead or purchase money, labor or materials furnished, or removal of incumbrances.

2 *Pulliam et als. v. Sewall et als.*, 40 Ga. 73.

3 *Gunn v. Barry*, 15 Wallace 610; *Walker v. Whitehead*, 16 Wallace 314; *Olcott v. Supervisors*, 16 Wallace 678.

4 *Hardeman v. Downer*, 39 Ga. 425.

5 Judgments in the State of Georgia are declared to be liens on all the real property of the debtor. In North Carolina judgments were not liens on real property till made so by the recent adoption of the code.



In the case of *Chambliss v. Phelps*<sup>1</sup> the Court said : “ A mortgage given by the debtor is not one of the exceptions provided by the Constitution to which the homestead for his family is liable.” “ An execution which was issued from a judgment to foreclose a mortgage before the adoption of the Constitution of 1868 cannot be enforced against the homestead. A homestead is subject to an execution founded upon debt contracted for the purchase money, and the fact that the debt was transferred to a third party, does not change that liability ; and it is subject to the payment of the purchase money, whether contracted before or since the Constitution.” In the case of *Gunn v. Barry*,<sup>2</sup> the constitutionality of retro-active exemption and homestead laws came again before the Supreme Court of Georgia, under the following state of facts: In 1866, Gunn obtained a judgment against one Hart and *fi. fa.* issued thereon. Under the Homestead Act of October 3d, 1868, Hart had certain lands set apart as his homestead. Subsequently Gunn tried to get the sheriff, Barry, to levy his *fi. fa.* on said land, but he would not, on the ground that the land had been so set apart. Gunn reciting these facts asked for a mandamus to compel such levy, upon the ground, that, as to this prior indebtedness, said homestead act was not operative under the Constitution of the United States. The Court held that it was, and refused to grant the mandamus. On appeal to the Supreme Court of the State, the judgment of the lower Court was affirmed, the Court holding that the Homestead Act was valid and constitutional as against judgments obtained prior to its date. Upon a writ of error this case was brought before the Supreme Court of the United States.<sup>3</sup>

§ 48. The lien of a judgment is a vested right, and cannot be disturbed by a constitutional provision, even though such constitution be ratified by Congress. The Constitution of the United States is above and beyond the interference of Congress.

<sup>1</sup> 39 Ga. 386.

<sup>2</sup> 44 Ga. 351.

<sup>3</sup> *Gunn v. Barry*, 15 Wallace 610.



When the judgment was obtained by Gunn against Hart in May, 1866, the exemption law of the State of Georgia, then in existence, exempted from forced sale property belonging to the head of a family of 50 acres of land, the land to include the dwelling-house, if the same and improvements did not exceed \$200 ; also farming utensils, horse, cow, etc., and necessary household furniture. At the time the judgment was obtained, Hart had 272½ acres of land, worth \$1,300, and the judgment bound it as a lien. He had no other land or property, except one piece worth about \$100. In 1868, Georgia adopted its constitution, in which it is provided that "each head of a family, or guardian, or trustee of a family of minor children, shall be entitled to a homestead of realty to the value of \$2,000 in specie, and personal property to the value of \$1,000 also in specie, to be valued at the time they are set apart." "And no Court or ministerial officer in this State shall ever have jurisdiction or authority to enforce any judgment decree or execution against said property so set apart." The constitution having been thus adopted in form by the people of Georgia, Congress, by an Act of June 25th, 1868,<sup>1</sup> admitted the State of Georgia to representation in Congress. The constitution of Georgia being thus approved by Congress, and operative, the Legislature of that State, on the 3d of October, 1868, passed an Act to provide for setting apart a homestead of realty and personalty, and for the valuation of the same as required by Sec. 1 of Art. 7 of their constitution. Under the Act all the land of Hart, the defendant, which in all was worth about \$1,400, was set apart to him and his family as a homestead. The question of the constitutionality of said laws as against Gunn, who had obtained his judgment before the adoption of the constitution, and before the passage of the new exemption law, thus came before the Supreme Court of the United States. The Court, after comparing the exemption laws of Georgia in force at the time the judgment was entered in the case and the exemption laws passed subsequently, says:<sup>2</sup> "No one can cast his eyes over the former and later exemptions, without being

<sup>1</sup> 15 Stat. at Large, 73

<sup>2</sup> 15 Wallace, p. 622.

struck by the greatly increased magnitude of the latter," and after quoting Sec. 10 of Art. 1 of the Federal Constitution, continues: "If the remedy is a part of the obligation of the contract, a clearer case of impairment can hardly occur than is presented in the record before us. The effect of the Act in question, under the circumstances of this judgment, does not indeed merely impair, it annihilates the remedy. There is none left."

"But the act reaches still further. It withdraws the land from the lien of the judgment, and thus destroys a vested right of property which the creditor had acquired in the pursuit of the remedy to which he was entitled by law as it stood when the judgment was recovered. It is in effect taking one person's property and giving it to another without compensation." "This is contrary to the social compact."<sup>1</sup> "Though her constitution was sanctioned by Congress<sup>2</sup> this provision can in no sense be considered an act of that body. The sanction was only permissive as a part of the process of her rehabilitation, and involved nothing affirmative or negative beyond that event." "Congress cannot, by authorization or ratification, give the slightest effect to a State law or constitution in conflict with the Constitution of the United States. That instrument is above and beyond the power of Congress and the States, and is alike obligatory upon both."

"A State can no more impair an existing contract by a constitutional provision than by a legislative act; both are within the prohibition of the National Constitution."

"The legal remedies for the enforcement of a contract which belong to it at the time and place where it is made, are part of its obligation. A State may change them, provided the change involves no impairment of a substantial right. If the provision of the constitution or the legislative

<sup>1</sup> *Calder v. Bull*, see 3 *Dallas* 388.

<sup>2</sup> It was argued, with some persistency on the part of the defendant in error, that as the constitution of Georgia was sanctioned by Congress, that in fact it was made through the power and agency of Congress, under its law, and under its eye; that it was more the work of Congress than of the State; if it was not an Act of Congress, it had all the validity of such an Act. That Congress could pass laws impairing the obligation of contracts. Citing *Evans v. Eaton*, *Peters C. C.* 322.

act of a State, fall within the category last mentioned, they are to that extent utterly void. They are, for all the purposes of the contract which they impair, as if they had never existed. The constitutional provision and statute here in question are clearly within that category, and are therefore void."

"The jurisdictional prohibition (that officers shall not enforce execution, etc.) which they (the constitution and statutes) contain with respect to the Courts of the State, can, therefore, form no impediment to the plaintiff in error in the enforcement of his rights touching this judgment, as those rights are recognized by this Court."<sup>1</sup>

"Judgment reversed, cause remanded to the Supreme Court of Georgia, with directions to enter a reversal to reverse the judgment of the Superior Court of Randolph County."

**§ 49. Validity and remedy both parts of the contract.**—The constitutionality of the retrospective laws of Georgia was again involved in the case of *Walker v. Whitehead*,<sup>2</sup> in which case it was held that the provisions of the Act of October, 1870, were constitutional. The plaintiff brought suit in January, 1870, on a promissory note for \$7,219.47, given in March, 1864, payable in March, 1865. The Act of 1870 enacted that "in all suits pending on any contract made before June 1st, 1865," it should not be "lawful for the plaintiff to have a verdict" unless he made "it appear that all taxes chargeable by law on the same had been duly paid for each year since the making of the same," and further enacted that it should be a condition precedent to such recovery, that the said debt has been regularly given in for taxes, and the taxes paid, and made other retrospective enactments. When the case was called on the calendar the defendant moved the Court to dismiss it, "because the plaintiff had not filed an affidavit of the payment of the taxes upon the note, as required by the Act of the Legislature of Georgia, of the 13th

<sup>1</sup> Citing *White v. Hart*, 13 Wallace 646; *Von Hoffman v. City of Quincy*, 4 Wallace 535.

<sup>2</sup> 43 Ga. 530.

of October, 1870. The plaintiff objected upon several grounds. The Court overruled his objections and dismissed the case. The plaintiff thereupon removed it to the Supreme Court of the State. That Court affirmed the judgment of the Court below.

Upon writ of error, the case was taken to the Supreme Court of the United States.<sup>1</sup> This latter Court said: "The contract here in question is within the predicate of this act.<sup>2</sup> It was made more than six years before the act was passed. The act was retrospective—denounced a penalty not before prescribed for the non-payment of taxes—and, if such delinquency had existed for a single year, confiscated the debt by making any remedy to enforce payment impossible. The denunciation and the penalty came together. There was no warning, and there could be no escape. The purpose of the act was plainly not to collect back taxes—that was neither asked nor permitted as a means of purgation—but to bar the debt and discharge the debtor.

"The act is not an *ex post facto* law, only because that phrase, in its legal sense, is confined to crimes and their punishment."

"The Constitution of the United States declares that no State shall pass any 'law impairing the obligation of contracts.'"

<sup>1</sup> *Walker v. Whitehead*, 16 Wallace 315.

<sup>2</sup> The Act of the Legislature of Georgia of October 13th, 1870, was as follows:  
SEC. 1. That "all suits pending or hereafter brought in or before any Court of the State, founded upon any debt or contract, or cause of action, made or implied, before the 1st June, 1865, or upon any other debt or contract in renewal thereof, it shall not be lawful for the plaintiff to have a verdict or judgment in his favor, unless he has made it clearly to appear before the tribunal trying the same, that all legal taxes, chargeable by law upon the same, have been duly paid for each year since the making or implying of said debt or contract."  
SEC. 2. "In any suit now pending or hereafter brought, it shall be the duty of the plaintiff, within six months after the passage of this Act, if the suit be pending, and at the filing of the writ, if the suit be hereafter brought, to file with the Clerk of the Court of Justice, an affidavit, if the suit was founded on any debt or contract as described in Sec. 1, that all legal charges, chargeable by law upon such debt or contract, have been duly paid, or the income thereon, for each year since the making of the same, and that he expects to prove the same upon the trial, and, upon failure to file such affidavit as herein required, said suit shall, on motion, be dismissed."

“These propositions may be considered consequent axioms in our jurisprudence.” “Nothing is more material to the obligation of a contract than the means of its enforcement. The ideas of validity and remedy are inseparable, and both are parts of the obligation which is guaranteed by the Constitution against the impairment.” “The obligation of a contract ‘is the law which binds the parties to perform their agreement.’ Any impairment of the obligation of a contract—the degree of impairment is immaterial—is within the prohibition of the Constitution.

“The States may change the remedy, provided no substantial right secured by the contract is impaired. Whenever such a result is produced by the act in question, to that extent it is void. The States are no more permitted to impair the efficacy of a contract in this way than to attack its vitality in any other manner. Against all assaults coming from that quarter, whatever guise they may assume, the contract is shielded by the Constitution. It must be left with the same force and effect, including the substantial means of enforcement which existed when it was made. The guarantee of the Constitution gives it protection to that extent.”<sup>1</sup>

“The effect of these propositions upon the judgment before us requires but a single remark. A clearer case of a law impairing the obligation of a contract within the meaning of the Constitution can hardly occur.”

“The judgment of the Supreme Court of Georgia is reversed, and the cause will be remanded to that Court, with directions to enter a judgment of reversal, and then to proceed.”<sup>2</sup>

**§ 50 New rule—no homestead as against prior debt.—** The rule adopted in Georgia since the foregoing decision of *Gunn v. Barry* seems to be, that in order to be entitled to a homestead under the constitution of 1868, the claimant must be free from debt. A simple indebtedness, which accrued

<sup>1</sup> Citing *Von Hoffman v. City of Quincy*, 4 Wallace 535.

<sup>2</sup> See the very able review of the questions here involved reported in *Am. L. Reg.* April 1874 Vol. 13 N. S. 236 from Supreme Court Mississippi, in case of *Lasey v. Phipps*; also the Homestead Cases, 22 Gratt. 266.

before the adoption of the constitution, will subject the homestead to sale on execution issued on a judgment rendered for such debt.<sup>1</sup>

<sup>1</sup> Jones v. Brandon, 48 Ga. 593; Chambliss v. Jordan, 50 Ga. 81. But see Larence v. Evans, 50 Ga. 216; Gunn v. Thornton, 49 Ga. 380; Smith v. Whittle, 50 Ga. 626.

## CHAPTER III.

## CONSTRUCTION OF STATUTES AND CONSTITUTIONAL PROVISIONS.

**§ 51.** The great object with reference to which all the rules and maxims that govern the interpretation of statutes, constitutions, and other written instruments have been framed, is to discern the true intent of their authors, to ascertain the meaning, the force, and effect which the Legislature which enacted such statute, or the convention which adopted such constitution, intended it should have.<sup>1</sup>

**§ 52.** One of the cardinal rules of interpretation referred to is, that in the absence of ambiguity of expression no exposition shall be made which is opposed to the express words of the instrument. A writer on American law says: "Where the meaning is satisfactorily perceived and understood, there is no room for a liberal or strict or equitable or large or narrow, or other construction than according to the meaning."<sup>2</sup>

But if the words are ambiguous, the following points must be investigated: the occasion and necessity of the law, the evil to be overcome, and the remedy had in view. Every statute must be construed with reference to the object contemplated in its provisions, so as to effectuate the intention of the legislature, and the statute must have a reasonable construction in conformity with its general object.<sup>3</sup> Mr. Justice Blackstone says that "words are generally to be understood in their usual and most known signification, not so much regarding the proprieties of grammar as their general and pop-

<sup>1</sup> *Kenedy v. Kenedy*, 2 Ala. 572; *Canal Co. v. Railroad Co.*, 4 Gill and J. (Maryland) 1, 152.

<sup>2</sup> 6 Dane's Digest, 600.

<sup>3</sup> *Wassell v. Tunnah*, 25 Ark. 101.

ular use;" \* \* that "if words happen to be dubious, their meaning may be established from the context, or by comparing them with other words and sentences in the same instrument; that illustrations may be further derived from the subject-matter with reference to which the the expressions are used; that the effect and consequence of a particular construction is to be examined, because if a liberal meaning would involve a manifest absurdity, it ought not to be adopted; and that the reason or spirit of the statute or the causes that led to its enactment are often the best exponents of the words, and limit their application.<sup>1</sup> If the intention of the law-making power can thus be clearly ascertained it should be followed, and in no case more than in the interpretation of the homestead statutes.

**§ 53. The word "homestead" is used both in the constitutions and in the statutes in its ordinary and popular sense, or in other words, its legal sense is also its popular sense.<sup>2</sup>**

**§ 54. As to the construction of statutes of exemption,** some disagreement exists among the authorities, whether they should be construed strictly as being in derogation of the common law, or liberally as being remedial in their tendency. But the weight of opinion seems to incline to the latter construction; that they are remedial in their nature and are to be liberally interpreted,<sup>3</sup> and that they should be construed with a view to secure the object intended. This view is probably the best, and the one most likely to lead to a reasonable and just result.<sup>4</sup> Says Bronson, J., in *Walker v. Harris*:<sup>5</sup> "The current of authority at the present day is in

<sup>1</sup> 1 B. Com. 59; 1 Kent. Com. (2d) 460.

<sup>2</sup> *Gregg v. Bostwick*, 33 Cal. 227; *Estate of Delaney*, 37 Cal. 179.

<sup>3</sup> *Hawthorne v. Smith*, 3 Nev. 182; *Noland v. Wickham*, 9 Ala. 169; *Wassell v. Tunnah*, 25 Ark. 101; *Robinson v. Wiley*, 15 N. Y. 489; *Kitchell v. Burgwin*, 21 Ill. 44; *Montague v. Richardson*, 24 Conn. 338; *Voorhies v. Bonnestel*, 7 Blatch. 500; *Favers v. Glass*, 22 Ala. 621; *Richardson v. Buswell*, 10 Met. 506; *Wade v. Jones*, 20 Mo. 75; *Derre v. Chapman*, 25 Ill. 610; *Hill v. Johnston*, 29 Penn. St. 363; *Charless v. Lamberson*, 1 Iowa 441; *True v. Morrill*, 28 Vt. 674; *Pool v. Reid*, 15 Ala. 826.

<sup>4</sup> *Gibson v. Jenney*, 15 Mass. 205.

<sup>5</sup> 20 Wendell 562.



favor of reading statutes according to the natural and most obvious import of the language, without resorting to subtle or forced construction for the purpose either of limiting or extending their operation."

**§ 55. Homestead exemption is the creature of statute,** and in interpreting the homestead laws this must be borne in mind, that any one claiming the privileges of the law must comply with its requirements and conditions: hence whether a man seeks to establish his right as plaintiff, or maintain it as defendant, he must be careful in his pleadings and his proof to bring his case within the provisions of the statute, or at least within its equity.<sup>1</sup>

While exemption laws should be liberally construed, and "statutes granting exemptions should receive such construction as will carry out the the liberal and benevolent policy of the legislature, yet parties must bring themselves within their provisions, at least in spirit, before they can claim exemption under them."<sup>2</sup> They "are purely the creations of statute law, and the scope and extent of rights of parties claiming benefit under them, must be determined by reference to the statutes."<sup>3</sup> "The law exempting property from execution, being remedial and resting on a wise policy, should as far as practicable be construed beneficially for the debtor."<sup>4</sup>

**§ 56. The requirements of the statutes must be followed.**—The statutes of California, (1862) Ohio, Iowa, Maine, Michigan, Georgia, Texas, Alabama, Illinois, South Carolina, and some others, require the homestead claimant to proceed in a special manner, and to take certain steps—such as selec-

<sup>1</sup> Beecher v. Baldy, 7 Mich. 502; Thoms v. Thoms, 45 Miss. 263; Helfenstein v. Cave, 3 Iowa 290; Walters v. People, 18 Ill. 194; Charles v. Lamberson, 1 Iowa 441; Kitchell v. Bourgwin, 21 Ill. 44; Bevan v. Hayden, 13 Iowa 122; True v. Morrill, 28 Vt. 674.

<sup>2</sup> 13 Iowa 122; Id. 1 Iowa (Coles Ed.) 435; see Himmelmann v. Schmidt, 23 Cal. 117.

<sup>3</sup> 45 Miss. 273.

<sup>4</sup> Alvord v. Lent, 23 Mich. 369; Robinson's Case, 3 Abb. Pr. (O. S.) 467; Eastman v. Caswell, 8 How. Pr. 75; Carpenter v. Herrington, 25 Wend. 370; Cook v. McChristian, 4 Cal. 26; Id. 1 Iowa 512.

tion, declaration, and recording—to obtain the benefit of the homestead exemption, and where these proceedings are distinctly pointed out and required by the statute, they form conditions precedent essential to the validity of the exemption,<sup>1</sup> and in case of a failure by the husband or wife, as the case may be, to do what the statute requires, the family is affected by the default.<sup>2</sup> Under some statutes, however, no mode is pointed out by which the “intention to dedicate the property as a homestead shall be made known; in such cases the occupation of the premises by the family would “by the common law,” raise the presumption that the premises so held by the family constituted the homestead,” and every one would be bound to take notice of the character of the occupant’s claim.”<sup>3</sup> In California, under the Act of 1851, the Court has frequently held that residence by the family was presumptive evidence of the appropriation of the premises as a homestead, and is notice of the homestead right to all the world. The residence required was actual, not constructive.<sup>4</sup>

In the later statutes of California in 1860, 1861, 1862, and 1868, and in the Code, 1872, the mode of protecting homestead rights created under the Act of 1851, and of creating like rights thereafter, and of protecting them when so acquired, was so varied as to afford a more efficient protection to the community as against the right, and the directory clauses in these acts concerning the declaration and recording of the homestead being formal and precise, a failure on the part of the exemption claimant to comply with their requirements will prevent the homestead right from accruing.<sup>5</sup>

<sup>1</sup> *Manning v. Dove*, 10 Rich S. C. (Law) 403; *Frierson v. Wesberry*, 11 Id. 355; *Slonkers v. Beardsley*, 9 Ohio St. 591; *Helpenstein v. Cave*, 3 Iowa 292; *People v. Plumsted*, 2 Mich. (Gibbs) 469; *Frost v. Shaw*, 3 Ohio St. 272; *Wildes v. Vanvoorhis*, 15 Grey 143; *Lawton v. Bruce*, 39 Maine 486; *Pinkerton v. Tumlin*, 22 Geo. 165; *Herschfeldt v. George*, 6 Mich. 468; *Beecher v. Baldy*, 7 Id. 509; *Line’s Appeal*, 2 Grant’s Case 197.

<sup>2</sup> *Davenport v. Alston*, 14 Geo. 271; *Crow v. Whitworth*, 20 Id. 38; *Tadlock v. Eccles*, 20 Texas 782; *Brewer v. Wall*, 23 Id. 589; *Getzler v. Saroni*, 18 Ill. 518; *Simpson v. Simpson*, 30 Ala. 225.

<sup>3</sup> *Cook v. McChristian*, 4 Cal. 23; *Reynolds v. Pixley*, 6 Cal. 165.

<sup>4</sup> *Holden v. Pinney*, 6 Cal. 234; *Reynolds v. Pixley*, 6 Id. 165.

<sup>5</sup> *Bartholomew v. Hook*, 23 Cal. 278; *In re Reed*, Id. 410.

**§ 57. Construction of amendments to original statutes**—Where an original statute has passed through many alterations by being remodeled and amended, the amendments and alterations must be considered together, in relation to like matter, with the original act, “in order to ascertain what rights and interests were brought into being by the force of these acts of the Legislature acting upon conditions precedent to their possible operation.”<sup>1</sup>

**§ 58. Liberal and strict construction of statutes.**—The principles of construction applied to the homestead statutes by some few of the Courts, are of the strictest character as to a statute in derogation of the common law,<sup>2</sup> while other Courts have sought “even in terms of rhetoric for adequate forms of expressing the liberal extent to which the statute should be carried.”<sup>3</sup> In a recent case in New Hampshire,<sup>4</sup> Perley, Ch. J., declared the opinion of that Court to be that the statute should have a liberal interpretation to accomplish the object of the law, not a narrow construction tending to defeat the humane object of the statute. That object was declared to be to leave for the upholding and support of the debtor's family a property where they lived, not exceeding \$500 in value, that should be protected from levy and attachment for his debts.

**§ 59. The statute is treated as a remedial measure and is construed liberally in Illinois.**<sup>5</sup>—The homestead exemption law of that State<sup>6</sup> provides that in addition to the property now exempt by law from sale under execution, there shall be exempt the lot of ground and the building thereon occupied as a residence and owned by the debtor, being a householder and having a family.

<sup>1</sup> *McQuade v. Whally*, 29 Cal. 612; *Kilgore v. Beck*, 40 Geo. 293.

<sup>2</sup> *Olson v. Nelson*, 3 Minn. 60, Emmet C. J. dissenting; *Rue v. Alter*, 5 Denio 119; *Allen v. Cook*, 26 Barb. 376.

<sup>3</sup> Washb. R. Prop. 326. See case of *Vogler v. Montgomery*, 54 Mo. 578; case given in full in April No. 1874 Am. L. Register, 244; *Gunnison v. Twitchel*, 38 N. H. 69.

<sup>4</sup> *Buxton v. Dearborn*, 46 N. H. 44.

<sup>5</sup> *Deere v. Chapman*, 25 Ill. 612.

<sup>6</sup> *Scates Comp.* 576, Sec. 1.

“The statute must have a construction so liberal as to advance the object contemplated by the legislature and nothing more, and we are to understand by its phraseology that several things must concur before exemption can be allowed. The lot of ground must have a building or buildings upon it, this building or buildings must be occupied as a residence; it must be owned by the debtor, who must be a householder and have a family. \* \* A cabin or tent, or some other structure in which a residence might be taken up, might satisfy the requirements of the statute that a building should be upon the land. Having a wife is having a family.”<sup>1</sup>

**§ 60. Construction of statutes in Arkansas.**—In Arkansas, the Court says: “In view of the enlightened public policy which dictated the Homestead Act and its obvious intent, the phraseology, one town or city lot, must be understood as the lot or piece of ground on which the head of the family has a house, with the appurtenances, which he uses as a home, no matter whether it contains more or less than one lot according to the plat and survey of the town or city.”<sup>2</sup> So in Nevada a liberal construction is given to the homestead and exemption laws—the Supreme Court says that it was clearly the intention of the constitution to protect a debtor’s homestead from forced sale, and that it was equally clear that the legislature intended to effectuate that intention. “This being the policy of the law, creditors will not be allowed to defeat its object, unless the statute clearly gives that right, or clearly points out the contingency, upon the transpiring of which the debtor will lose his exemption.”<sup>3</sup> So that he who attempts to disturb the homestead right, must show that that right is given him under the statute.

**§ 61. In California** the same liberal interpretation has been given to the laws under consideration. The Supreme Court saying that the filing of a declaration of homestead by the wife alone, under the statute, which says that it must “be

<sup>1</sup> *Kitchell v. Burgwin*, 21 Ill. 40; *Franklin v. Coffee*, 18 Texas 413.

<sup>2</sup> *Wassell v. Tunnah*, 25 Ark. 101.

<sup>3</sup> *Hawthorne v. Smith*, 8 Nev. 182.

signed by the party making the same, and acknowledged and recorded as conveyances of real estate are required to be acknowledged and recorded," need not be acknowledged in the manner required by law in the case of the conveyance of the separate property of a married woman, it was held sufficient that the declaration be made, acknowledged, and recorded in the ordinary mode. The statute was construed to mean that only in the case of the alienation of the homestead was the wife required to make the acknowledgment in the form required in the case of the "conveyance of her separate real property." The Court further said that the conclusion at which it had arrived was "strengthened by the fact that the legislature had expressly required a declaration of abandonment to be acknowledged by the wife as she should acknowledge a conveyance of her separate real property," that is, "being made acquainted with the contents of the instrument," "and being examined separate and apart from her husband."<sup>1</sup>

But though this liberal construction is given to exemption laws, "the exemption from seizure will not be extended to objects not expressly designated in the law."<sup>2</sup>

§ 62. Texas, in 1839, passed an act that there should be, from and after the passage of the act, reserved to every citizen or head of family in this republic, free from any writ or execution issuing from any Court, fifty acres of land, or one town lot, including his or her homestead, and improvements not exceeding five hundred dollars in value, household furniture not to exceed two hundred dollars, implements of husbandry of the value of fifty dollars, tools, apparatus, and books belonging to the trade or profession of any citizen. The Supreme Court of Texas said, in construing the foregoing act, that the words "every citizen" should not be taken in a restricted sense, as designating only the native-born or naturalized citizen, but in its general acceptation and meaning as descriptive of the inhabitants of the country. They further held that the statute extends as well to single men or

<sup>1</sup> *Clements v. Stanton*, 47 Cal. 60.

<sup>2</sup> *Guillory v. Deville*, 21 La. An. 686.

individuals as to married men or heads of families. The terms are "every citizen or head of family"—that is, every individual independent of and not properly connected with a family as one of its members, and also every head of family shall be entitled, etc. So in regard to the tools, apparatus, books, belonging to the trade or profession of "any citizen" it was held that, not referring specifically to heads of families, it was very clear that no distinction in the Act was made between single men and heads of families, neither as regards the homestead, nor the other articles enumerated.<sup>1</sup>

**§ 63. Construction of statutes adopted from other States.**—Where the legislature enact a statute which is a literal transcript of a statute of another State, it will be presumed that they intended to adopt the construction which had been placed upon it by the highest Court of the State from whence it was borrowed.<sup>2</sup>

**§ 64. Interpretation of constitutional provisions.**—The constitution of Nevada, Art. IV, Sec. 30, which prescribes that the homestead "shall be exempt from forced sale under any process of law, and shall not be alienated without the joint consent of husband and wife \* \* provided the provisions of this section shall not apply to any process of law obtained by virtue of a lien given by the consent of both husband and wife," and expressly prohibits the Legislature from exempting the homestead from forced sale upon a lien created by husband and wife for a loan or indebtedness. Therefore the Act of March 6th, 1865, to exempt the homestead and other property from forced sale in certain cases, in so far as it provides that no valid mortgage, for the purpose of securing a loan or indebtedness, can be made by husband and wife upon their homestead, was held to be unconstitutional.<sup>3</sup>

**§ 65. Constitution of Minnesota and construction of statutes.**—Art. 1, Sec. 12, of the constitution of Minnesota

<sup>1</sup> Cobbs v. Coleman, 14 Texas 594.

<sup>2</sup> Skouten v. Wood, 57 Mo. 380.

<sup>3</sup> Dunker v. Chedie, 4 Nev. 378.

contains the following clause: "A reasonable amount of property shall be exempt from seizure or sale, for the payment of any debt or liability; the amount of such exemption shall be determined by law."

Accordingly, in 1851, the Legislature passed the homestead exemption law, which was amended in 1854. In these acts the Legislature provided for the exemption from forced sale, on execution or other process of a Court, this homestead as against any general indebtedness that the owner might incur, not connected with the land itself, or the improvements thereon; and such exceptions as would prevent the owner from increasing the value of his land at the expense of those who furnished him with labor or materials in its improvement, as well as the protection of the public in the collection of taxes and assessments, and liens of mortgage voluntarily created in the mode provided by law. The exemption and the exceptions to its operation are to be read together, as they were one act; and as to the class of claims excepted, it is as if there was no exemption, the land standing in relation to them as any other land of the owner would.<sup>1</sup>

A further exception was made in favor of clerks', laborers', and mechanics' wages, but the Supreme Court held in the case of *Tuttle v. Strout*,<sup>2</sup> that the section of the "Act for a homestead exemption" which excepts debts or liabilities due for the wages of clerks, laborers, and mechanics, from the operation of the exemption provided by the act, was unconstitutional and void. Emmet, C. J., said: "We cannot resist the conclusion that the ninth section of the act conflicts with Sec. 12 of the Bill of Rights. The language of the constitution is too plain to admit of a serious doubt either as to its interpretation or application to the act under consideration. 'A reasonable amount of property shall be exempt from seizure or sale for the payment of any debt or liability.' This includes debts or liabilities of every kind or description, without exception; and it certainly requires no argument to show that a sum of money due for services rendered by a

<sup>1</sup> *Olson v. Nelson*, 8 Minn. 53; *Cogel v. Mickow*, 11 Id. 475.

<sup>2</sup> 7 Minn. 465.



clerk, laborer, or mechanic, is a debt or liability. The constitution makes no exception in favor of any particular class of persons, or kind of debt or liability ; nor should we recognize the right of the legislature to make any such distinctions. If one class of persons, or kind of debts or liabilities, may be excepted, all may be, and the constitutional provision thus rendered entirely nugatory.”<sup>1</sup>

**§ 66. The Arkansas constitution of 1868, Art. 12, under the title of “Exempted Property,” Sec. 1, provides that “the personal property of any resident of this State, to the value of \$2,000, to be selected by such resident, shall be exempted from sale on execution.” Sec. 2 provides that, “hereafter the homestead of any resident in this State, who is a married man or head of a family, shall not be encumbered in any manner while owned by him, except for taxes, laborers’ and mechanics’ liens, and security for the purchase-money thereof.” Sec. 3 provides that, “every homestead, not exceeding 160 acres of land, and the dwelling and appurtenances thereon, to be selected by the owner thereof, and not in any city, town, or village, or in lieu thereof, at the option of the owner, any lot in a city, town, or village, with the dwelling and appurtenances thereon, owned and occupied by any resident in this State, and not exceeding the value of \$5,000, shall be exempted from sale on execution ;” but no property shall be exempt from sale for taxes for the payment of obligations contracted for the purchase of said premises, for the creation of improvements thereon, or for labor performed for the owner thereof, etc.**

In the case of *Greenwood v. Maddox*<sup>2</sup> the Court said : “Sec. 3 is to be construed in connection with Secs. 1 and 2, and so construed it exempts all homesteads from sale on execution or other final process except in the instances in the Secs. named, and it does not, by any of its expressions, limit the benefit of this exemption to married men or heads of families. Under Sec. 2 the homestead of an unmarried man

<sup>1</sup> The Act at present in force contains no such provision.

<sup>2</sup> 27 Ark. 648.



may be encumbered, but a married man or head of a family cannot encumber his homestead."

**§ 67. Constitution of Michigan, 1850, limiting value, rights under law of 1848, when no limit to value.**—In Michigan, where under a statute passed in 1848, there was no limit as to the value of the homestead, subsequently, in 1850, a new constitution was adopted, limiting the value of the homestead to \$1,500. It was held that a homestead of the value of \$5,000, or any homestead, was not exempt under the following facts :

In April, 1858, one Baldy obtained a judgment against Beecher for \$1,000 and costs, upon a debt contracted in April, 1857. Beecher filed his bill to restrain the defendant from proceeding to sell the property claimed as a homestead to satisfy the judgment. The bill alleged that the lot of ground was twenty-five feet front by one hundred feet in depth, that the entire front of said lot is covered by the dwelling-house, that he selected said premises many years ago, and long before the obtaining of said judgment, as his homestead ; that at the time of the selection of said homestead it was worth more than \$1,500, to wit, the sum of \$5,000.

It was contended on the part of the homestead claimant, that the phrase in the constitution, "not exceeding fifteen hundred dollars," was not to be construed as a limitation upon the power of the legislature, but that the intention of the constitution was only to require that a homestead to that amount at least should be exempt at all events, leaving it to the legislature to exempt a larger amount if they should see fit ; and hence that it was not repugnant to the law of 1848, and that both the law of 1848 and the constitution of 1850 might stand together.

But the Court held that the sum mentioned in the constitution was a limitation, and that a homestead cannot be exempt as an entirety which, at the time it is first claimed as a homestead, is worth a greater amount ; that therefore the constitution was repugnant to the statute, and to that extent repealed it.<sup>1</sup>

<sup>1</sup>Smith v. Hickman, 2 Cooke Ch. (Tenn.) 330. Per contra, see McCartee v. Orphan Asylum Society, 9 Cow. 437; Byrne v. Stewart, 3 Dessau (S. C.) 135.

The Court further held that where the house covered the whole front of the lot, and could not be divided, and that it was worth five thousand dollars, it was not exempt from forced sale; the legislature having provided no means, in such case, of selecting the required exemption.

The Court admitted that the constitutional provision was an express prohibition against a forcible sale on execution of the homestead described in it—that is, a house and lot of the value of fifteen hundred dollars. The Court said: “If, then, when reduced in quantity as far as divisible, without cutting off any part of what is essential to constitute it a homestead—of what is necessary to its ordinary use as such—it still exceeds the specified value, it is not one of the homesteads, the forced sale of which is prohibited by the constitution, and cannot therefore be exempt by the operation of that instrument alone.<sup>1</sup> The constitution has exempted a homestead of a certain description. Where the homestead does not answer this description, it is competent for the legislature to exempt something out of it, or in lieu of it, as an equivalent in value. This would not be contrary to the constitution, but in analogy to it. But what this equivalent should be, whether a part of the premises, their use for a certain time, or so much cash, as part of the proceeds of sale, is matter for legislation, not for judicial discretion. It is not for the Courts to remedy all the inequalities, real or imaginary, of the constitution or statutes. The premises claimed as a homestead in this case are stated in the bill to be worth five thousand dollars. This takes them out of the description of a homestead exempt by the constitution. The only ground on which complainant could claim a homestead out of these premises at all, was by showing that they were divisible, in such manner as to leave a homestead, including the dwelling-

<sup>1</sup> The clause in the constitution is as follows: “Every homestead \* \* \* to be selected by the owner thereof, any lot in any city, village, or recorded town plat, \* \* \* and the dwelling-house thereon and its appurtenances, owned and occupied by any resident of the State, not exceeding in value fifteen hundred dollars, shall be exempt from forced sale on execution or any other final process from a Court, for any debt contracted after the adoption of this constitution.”

house and appurtenances, within the prescribed value. The bill alleges nothing of the kind ; but from the description in the bill it is quite evident they were not thus divisible. At all events, this being a right existing only by the force of the constitution,<sup>1</sup> it was for the complainant, by his allegations, to bring himself within the constitution ; and not having alleged the premises to be divisible, they must, as the bill now stands, be considered indivisible, and therefore not exempt either wholly or in part.”<sup>2</sup>

<sup>1</sup> *Beecher v. Baldy*, 7 Mich. 500-1. See case of *Baylor and Dawson v. San Antonio Nation. Bank*, 38 Texas 448.

NOTE.—We have given an extended notice of this case of *Beecher v. Baldy*, as it presents an interpretation of the statute in relation to homesteads at variance with most of the cases which have come under our observation. See chap. 4, sec. 2, nature of the right. See *Dulanty v. Pyncheon*, 6 Allen 510 ; *Lazell v. Lazell*, 8 Allen 575 ; *Connor v. McMurray*, 2 Allen 204 ; *Castle v. Palmer*, 6 Allen 404 ; *Goldman v. Clark*, 1 Nev. 607 ; *Baylor and Dawson v. Na. Bank*, 38 Texas 448 ; *Fogg v. Fogg*, 40 N. H. 284 ; *Finley v. Dietrick*, 13 Iowa 517 ; *Clark v. Potter*, 13 Grey 21 ; *Cohen v. Davis*, 20 Cal. 187. But under an amendment to homestead law, requiring notice to be filed, see *Estate of Reed*, 23 Cal. 410 ; *Noble v. Hook*, 24 Cal. 638 ; *Kelly v. Baker*, 10 Min. 154 ; *Finley v. Dietrick*, 12 Iowa 517.

<sup>2</sup> See *Van Hook v. Whitlock*, 2 Edw. Ch. 304, in which case it is held that “where a remedial statute does not point out the manner in which it shall be enforced, an action lies in favor of the party aggrieved by implication. See *Manning v. Merritt*, 1 Clark (Ch. N. Y.) 98 ; *Ward v. Huhn*, 16 Minn. 159. See case of *Line’s Appeal*, 2 Grant’s cases 197 ; *Dodson’s Appeal*, 1 Casey 25 Penn. St. 232 ; *Fogg v. Fogg*, 40 N. H. 282

## CHAPTER IV.

## NATURE AND EXTENT OF THE RIGHT.

**§ 68. Definition of the word homestead.** — “The homestead” is defined by Webster to be “the place of a mansion-house—the enclosure of ground immediately connected with the mansion.” “The home-seat of the family.” In law, “a person’s dwelling-place, with that part of his landed property which is about and contiguous to it.”

“A homestead is a house or dwelling-place used as a home, and designed as a shelter of the homestead roof,” together with the prescribed quantity of land on which the house is situated. The homestead, therefore, means the home place. It is the dwelling-place of the family, where they permanently reside.<sup>1</sup> “A man’s homestead must be his place of residence, the place where he lives, where he usually sleeps and eats, where he surrounds himself with the ordinary insignia of a home, and where he may enjoy its immunities and privacy.”<sup>2</sup> “A homestead is the residence of the family—is the place where the home is—and it would seem unreasonable, on first impression, that the premises should be regarded as a homestead, unless devoted principally to such residence and home.”<sup>3</sup> It represents a portion of land with the dwelling-house, where the family resides, with the usual and customary appurtenances, including out-houses of every kind necessary or convenient for family use. Whatever is used being necessary or convenient as a place of residence, as contradis-

<sup>1</sup> *Cook v. McChristian*, 4 Cal. 26; *Taylor v. Hargous*, 4 Cal. 268; *Franklin v. Coffee*, 18 Texas 415; *Walters v. The People*, 18 Ill. 194; *Tumlinson v. Swinney*, 22 Ark. 400.

<sup>2</sup> *Philleo v. Smalley*, 23 Texas 394.

<sup>3</sup> *Ackley v. Chamberlain*, per Field, C. J., 16 Cal. 181.

tinguished from a place of business, constitutes the homestead subject to the statutory limit.<sup>1</sup>

It is the inviolable sanctuary of the family, not merely of the head of the family, but of all its members, whether consisting of husband, wife, and children, or any other combination of human beings living together, such as brothers and sisters, mother, etc., and having a common object in their pursuits and occupations. Such a combination of persons thus circumstanced necessarily constitute the family. It is the homestead of a family, and not that of the head of a family simply which is protected. In its most comprehensive meaning it embraces a collective body of persons living together in one house, or within one curtilage, in legal phrase.<sup>2</sup>

**§ 69. The homestead right is not a fixed definite estate in the land.**—It was not intended by the homestead enactments to create a new estate, but simply an exemption to protect the homestead within the statutory or constitutional limit from forced sale.<sup>3</sup> This exemption is not an individual privilege of a debtor, apart from the family, but a protection thrown around the home, by the State, for the welfare of the household, of which the debtor cannot be deprived, if an unmarried person, without some act relinquishing the right; or if a married person, without the joint conveyance of the spouses.<sup>4</sup>

The right of homestead is the creature of statute, unknown to the common law. But it seems to partake of an interest or right in the home, indeterminate in its duration, which may continue for the joint lives of the possessor and his wife, and in some cases until the majority of their children. That it is defeasible does not change the quality of that right while it continues.<sup>5</sup> “Homestead rights cannot be transferred by

<sup>1</sup> *Tumlinson v. Swinney*, 22 Ark. 400; *Gregg v. Bostwick*, 33 Cal. 227; *McDonald v. Badger*, 23 Cal. 394.

<sup>2</sup> *Wilson v. Cochran*, 31 Texas 679; *Cox v. Wilder*, 2 Dillon C. C. 46; *Vogler v. Montgomery*, 54 Mo. 577.

<sup>3</sup> *McDonald v. Crandall*, 43 Ill. 232; *Bowman v. Norton*, 16 Cal. 219; *Howe v. Adams*, 28 Vt. 544, per Redfield, C. J.

<sup>4</sup> *Dye v. Mann*, 10 Mich. 291.

<sup>5</sup> *Silloway v. Brown*, 12 Allen (Mass.) 30; *Kerley v. Kerley*, 13 Allen 286.

any conveyance. They do not lie in grant. Such rights may be released or abandoned, but they are, in their nature, incapable of sale or transfer. The right to have property protected from forced sale is a purely personal right, which cannot be bought or sold.”<sup>1</sup>

In the case of *Allen v. Cook*,<sup>2</sup> the Court said that “the homestead right in New York, under the statute of 1850, was a purely personal right,<sup>3</sup> and merely enabled the debtor to have his homestead exempt from forced sale during his life, and that of his widow, and until his children had attained the age of twenty-one years; on condition that the householder and his family resided on the premises. If judgment was recovered against him in any suit, the homestead right did not operate to destroy the lien of judgment, but merely suspended its enforcement; so, therefore, if the householder sold his homestead premises, the right of exemption—which could not be sold—was gone, and the premises were liable in the hands of a grantee, for all previous liens of judgment recovered against the grantor.”<sup>4</sup> This case of *Cook v. Allen* was affirmed in *Smith v. Brackett*,<sup>5</sup> where the Court said: “The exemption is a mere personal privilege which the statute secures the debtor and to his widow and children, after decease, which does not run with the land, and which cannot be transferred to another with the land. The object of the statute seems to have been to secure a habitation for families, rather from motives of public policy than the protection of the debtor’s property against the claims of his creditors.”

**§ 70. Repeal of statute does not affect right acquired.**  
—The right of homestead once acquired under any previous

<sup>1</sup> *Bowman v. Norton*, 16 Cal. 219; *Gunnison v. Twitchel*, 38 N.H. 62.

<sup>2</sup> 26 Barb. 374.

<sup>3</sup> *Folsom v. Corli*, 5 Minn. 337.

<sup>4</sup> Of course the principles here announced have no application in those States where it is declared by statute that no lien of judgment attaches to the homestead. As to personal privilege, see *Norris v. Kidd*, to appear in 28 Arkansas. “Levy and sale void, no title passes where occupied as homestead,” see *Kendell v. Clark*, 10 Cal. 17; *Williams v. Young*, 17 Cal. 403; *Deffeliz v. Pico*, 46 Cal. 289.

<sup>5</sup> 36 Barb. 571; *Gunnison v. Twitchel*, 38 N. H. 62.

statute will not be affected by the repeal of such statute. Thus, in California, it was held that the Act of 1860, section 5, gives to the parties who claim a homestead under the Act of 1851, a right, if they wish to bring themselves within the rights and restrictions of the Act of 1860, by filing the declaration therein required ; but it does not compel them so to do, and until they have so filed the declaration they continue to be governed by the law of 1851.<sup>1</sup> In many of the States the homestead right is not waived or lost by the householder's removal therefrom with his family. When once lawfully acquired it cannot be released or lost, except by deed duly acknowledged according to law.<sup>2</sup>

**§ 71. The nature, tenure, or title of the estate in the land** is not changed or altered in any way on account of its destination to homestead uses. In a majority of the States the law makes no infringement upon the husband's or wife's right of property, nor does it affect the tenure of the property. The estate, whatever may have been its nature, continues in the person who was the tenant before it became homestead ; but for the purpose of securing the homestead to the family, the power of separate alienation is taken away.<sup>3</sup>

Premises which are thus occupied as a homestead by husband and wife, and have all the statutory properties thereof, but in which the husband has only an equitable interest, will be protected as a homestead, as well as when the legal title to the property is vested in the wife, and even though a portion of it is occupied for business purposes.<sup>4</sup>

**§ 72. Husband and wife, rights and privileges.**—Although the husband has the legal title to the homestead,

<sup>1</sup> *Finley v. Deitrick*, 12 Iowa 517 ; *Clark v. Potter*, 13 Grey (Mass.) 21 ; *Cohen v. Davis*, 20 Cal. 187, but see *Estate of Reed*, 23 Cal. 410, as to filing notice on or before June 1st, 1862 ; *Noble v. Hook*, 24 Cal. 638, see also *Kelly v. Baker*, 10 Minn. 154.

<sup>2</sup> *Delanty v. Pyncheon*, 6 Allen 510 ; *Lazell v. Lazell*, 8 Allen 575 ; *Connor v. McMurry*, 2 Allen 204 ; *Castler v. Palmer*, 6 Allen 404.

<sup>3</sup> *Gunnison v. Twitchel*, 38 N. H. 62 ; *Stewart v. Mackay*, 16 Texas 56 ; *Davis v. Andrews*, 30 Vt. 678 ; *Folsom v. Carli*, 5 Minn. 337.

<sup>4</sup> *Orr v. Shraft*, 22 Mich. 260 ; *McKee v. Wilcox*, 11 Mich. 358.



the wife, when there is one, has a right to insist that the homestead once acquired shall continue until another homestead is acquired, or until she consents to its alienation or abandonment. But she has no right in the homestead, independent of the husband, which she can enforce. The children, when there are any, have no title or estate whatever in the homestead, but have only a mere right to maintenance and shelter.<sup>1</sup>

It has been held in Nevada, that if the husband erects a house and resides therein with his family, such action on his part is sufficient to dedicate that property as a homestead, holding that the statute which requires the owner of the property to make his claim of homestead is merely directory. So long as the house and lot do not exceed the statutory limit in value it makes no difference that the house is large and suitable for other purposes, besides being used as a family residence. The object of the statute was stated to be "to protect five thousand dollars' worth of land and improvements, including the family residence."

Being once dedicated as a homestead it can only be divested of that character by the joint act or deed of husband and wife. A married woman can only convey by following the prescribed forms. No conveyance or lease by the husband alone can divest the premises of the character of homestead.<sup>2</sup>

"The right of the wife to the homestead of her husband and her interest in it, are present, fixed, and substantial; they are not merely possible, remote, or contingent. Her rights and interests are in possession and enjoyment, and not merely in expectancy or dependent. The husband and wife are as to the homestead practically joint tenants, subject to certain limitations for the benefit of the children. The husband cannot alienate the homestead, or even his own interest in it, except the wife concur in signing the conveyance." The nature of the wife's interest in the homestead is such, that, in general, it is not liable to be affected or concluded by the omission, neglect, or default of her husband.<sup>3</sup>

<sup>1</sup> Dawly v. Ayers, 23 Cal. 108.

<sup>2</sup> Goldman v. Clark, 1 Nev. 607.

<sup>3</sup> Adams v. Beale, Wright C. J. dissenting, 19 Iowa 61; Conroy v. Sullivan,



In Iowa it has been decided that the right of the wife in the homestead owned by the husband before marriage vests in the wife at the time of marriage. "It is of a higher character and more in the nature of a vested interest or title than a dower right in the other real estate of her husband. It is of such a vested character as clothes her with a right to redeem from tax sale—under a saving clause in favor of married women—after the time for redemption by the husband has expired."<sup>1</sup>

**§ 73. Nature of the estate or tenure of right in California.**—In a series of early decisions, in California, under the Homestead Act of 1851, it was held, that as soon as a place, by the occupancy in good faith of the family, acquired the character of a homestead, the nature of the estate was changed, without reference to the manner in which the title to the property originated, whether it was the separate estate of the husband, or the common property of both husband and wife; that it was turned into a sort of joint tenancy with the right of survivorship, at least as between husband and wife, and that this estate could not be altered or destroyed except by the concurrence of both in the manner prescribed by law.<sup>2</sup>

But in a series of subsequent decisions under the same statute, the theory of a joint tenancy as between the husband and wife is rejected, and it was held that the estate in the homestead continued and remained in the husband, it having been his separate, or community property. Said C. J. Field in *Gee v. Moore*:<sup>3</sup> "If the premises are the separate property of the husband or the common property of both husband and wife, before they become a homestead, they remain such separate or common property afterwards. \* \* We are aware of decisions of this Court holding different views from those expressed in this opinion. Thus, in *Taylor v. Hargous*<sup>4</sup>

44 Ill. 451; *Sargent v. Wilcox*, 5 Cal. 504; *Revalk v. Kraemer*, 8 Cal. 66; *Tadlock v. Eccles*, 25 Texas 782; *Marks v. Marks*, 9 Cal. 90.

<sup>1</sup> *Adams v. Beale*, 19 Iowa 61; *Chase v. Abbott*, 20 Iowa 154.

<sup>2</sup> *Taylor v. Hargous*, 4 Cal. 273; *Sargent v. Wilson*, 5 Cal. 504; *Estate of Tompkins*, 12 Cal. 114, and many other cases.

<sup>3</sup> 14 Cal. 472.

<sup>4</sup> 4 Cal. 273.

it is said that 'as soon as a place, by the occupancy in good faith by the family, acquires the character of a homestead, the nature of the estate is changed.'

"The doctrine as to the joint estate of the husband and wife, with the right of survivorship, is repeated in subsequent cases. This doctrine has never met with the approbation of the profession, and is not warranted by any language in the constitution or the statute. There is nothing in the nature of the homestead right or privilege which justifies its designation as such estate. The right or privilege has no single feature resembling a joint tenancy. The estate rests where it existed before the premises were appropriated as a homestead. The appropriation of them confers a right upon the wife to insist that their character as a homestead shall continue until she consents to their alienation, or until another homestead is provided, or they are otherwise abandoned. The wife, if surviving her husband, takes the homestead, not by virtue of any right of survivorship arising from the alleged joint tenancy, but as property set apart by law from her husband's estate, for her benefit and that of his children, if there be any. In the same way, other property exempt from forced sale is set apart to her."

The theory that the homestead estate was not a joint tenancy, though perhaps sound in law, was not popular in California. During the next session of the legislature, the Homestead Law Amendment Act of 1860 was passed, by which it was declared that the husband and wife shall be deemed to hold the homestead property as joint tenants, (Sec. 1) and the clause applied as well to homesteads held under the Act of 1851.

**§ 74. Nature of the tenure in California as to husband and wife continued.**—By the Act of 1862, the right of survivorship—the chief incident of a joint tenancy at common law—was added to the homestead estate in California.

The following opinion by Sawyer, C. J., in the case of *Barber v. Babel*,<sup>1</sup> gives the gist of the law, as it at present stands in that State. After stating the fact that the statutes

<sup>1</sup> 36 Cal. 16.

of 1860 and 1862 had changed the homestead estate into a joint tenancy with the right of survivorship, he proceeds: "There is no occasion to discuss at large the question as to whether the estate of the husband and wife is exactly the same in all respects, and with all the incidents of a joint tenancy in the technical sense of the term as used in the common law, or whether the term 'joint tenancy' is the best that could be chosen to express the intention of the legislature. But we do not perceive why the character of the right as defined does not substantially approach very near a joint tenancy, although not created in precisely the same way; even if not a technical joint tenancy at common law. In the homestead estate most of the unities of joint tenancy are found, for it is created by the same instrument and at the same time. The homestead right and the joint interests are created by the executing, acknowledging, and recording of the declaration. The new character of the estate with its new incidents commences at that moment, and the new rights vest in both parties at the same time. So far as the homestead right is concerned, 'they have one and the same interest accruing by one or the same conveyance, or act, commencing at one and the same time, and held by one and the same undivided possession.' If the husband controls the property during coverture, it is not because he has a greater, more valuable, or different interest in the homestead from that of his wife, but because the law has made him the head of the household, and devolved upon him the duty of management, not for his own interest merely, but for the joint benefit of both. And the right of survivorship, the grand incident of joint tenancy, is added. The main substantial difference now seems to be the want of power in one of the parties to sever the tenancy, or convey at all without the concurrence of the other in the mode prescribed. But however this may be, there is a joint interest in the homestead; a joint holding, if not a technical joint tenancy." "Although the mode of creating the joint estate or interest in the husband and wife is not a conveyance in form, from the one in whom the title stands upon the record to the two, and though the formal legal title may be conceded to remain where it

was before, yet the effect and operation of recording the declaration made in due form is to take from the separate property of the party owning, or the common property of both, the property claimed as homestead, and to vest in the two jointly an estate or interest in the land, which interest to the extent of the homestead value cannot thereafter while both live be severed, alienated, encumbered, divested, destroyed, or injured without the concurrent act of both parties, equally solemn and formal with that by which the new and different estate or interest was created. The new character of the estate or interest thus vested may be thrown off, and the land returned to its original status, by a declaration of abandonment duly executed, acknowledged, and recorded. The express provision that 'the husband and wife shall be deemed to hold as joint tenants' certainly means that they shall hold some estate or interest as to the homestead different from that held before; that the estate or interest in the homestead shall be joint, and that the wife, at least, shall have a more distinct, specific, individual, available, indestructible, and valuable interest or right than she held before; otherwise the provision is without meaning or consequence."

"Under the provisions of the law under consideration, there is a joint estate or interest in the homestead vested in the husband and wife, which can only be divested by the concurrent act of husband and wife." <sup>1</sup>

#### TO WHAT EXTENT MAY BE USED FOR PURPOSES OTHER THAN THE FAMILY DWELLING.

**§ 75. Diversity of opinion where quantity the limit.**—There is some diversity of opinion among the authorities in the construction of statutes, in relation to the latitude allowed in the uses to which the homestead exemption property may be put, especially under those laws which exempt a certain quantity of land instead of value.

**§ 76. A single building, portions rented out, exempt.**—In Wisconsin, under the Exemption Law of 1849, which pro-

vided that a homestead consisting of any quantity of land not exceeding forty acres, used for agricultural purposes, and the dwelling-house thereon and its appurtenances, to be selected by the owner thereof, and not included in any town plat or village; or instead thereof, at the option of the owner, a quantity of land, not exceeding in amount one-fourth of an acre, being within a recorded town plat, or city, or village, and the dwelling-house thereon, and its appurtenances, owned and occupied by any resident of this State, shall not be subject to forced sale, etc., from and after January, 1849. It was held in the case of *Phelps v. Rooney*,<sup>1</sup> that a building, the main portion of which was let out to tenants, and used as stores, bringing in \$1,500 a year rental—which was in style of architecture a store, and six-sevenths of its use and value were devoted to that purpose—was exempt under the homestead law, because the owner and his family occupied a few rooms in the top of the building as a residence. According to this construction the word “homestead,” as defined, means the land not exceeding the prescribed amount upon which the dwelling-house, residence, habitation, or abode of the owner is situated, without regard to the precise manner in which it is used, or the nature or the character of the building thereon, restrained only by the amount of land mentioned in the act, and upon the fact that it is actually occupied in good faith as a dwelling by the owner and his family. Nor does the owner forfeit the benefit of the exemptions by devoting the most valuable part of the building to another use than a mere residence for his family. “A construction,” said Dixon, C. J., dissenting, “which will enable a man to exempt, as his homestead, a lot with a shot-tower on it.”

**§ 77. Separate buildings, rented, not exempt.**—A case somewhat similar presented itself before the same Court, under the same statute, in the case of *Cassilman v. Packard*,<sup>2</sup> in which the Court decided that the quarter-acre was not ex-

<sup>1</sup> 9 Wis. 70.

<sup>2</sup> 16 Wis. 115; In *Re Tertelling*, 2 Dill. 341. In connection with the subject of the division of floors, or stories, by different owners and rights, see an able article in *American Law Register*, August 1862, Vol. 1 N. S. 577, Vol. 10 old series.

empt in toto, from the fact that, besides the dwelling-house, there were stores on the lot which were separate buildings. It was held that it was not the intention and meaning of the law, exempting one-fourth of an acre upon which the debtor lives, in a city or town, that all the buildings thereon, and the ground on which they stood, should be exempt merely because the debtor lives on one of them. That the exemption means no more of a lot to be exempt than is actually used as a homestead and occupied for that purpose, and that stores, etc., erected on the lot and rented out by the debtor, are in no sense portions of the homestead, and may be levied upon and sold.

**§ 78. Buildings designed exclusively for business purposes.**—In California the point has not been judicially determined, but it was questioned by the Court whether premises which are designed exclusively for business purposes, even though the family may happen to reside thereon, can be dedicated as a homestead. In the case of *Ackley v. Chamberlain*,<sup>1</sup> Field, C. J., says: "It would seem unreasonable, for example, that a gas factory should be impressed with the character of a homestead, because the owner resided with his family in an upper story of the building, or that a storehouse should become exempt from execution because the owner occupied the basement in the same way. The question whether property devoted chiefly to business purposes can be subject to a homestead claim is full of embarrassment."

**§ 79. May be used for business purposes and family dwelling.**—It seems that property may be devoted to homestead purposes, even when it is used for business purposes, provided that the business does not interfere with its general character as a family dwelling-house.

In the case of *Ackley v. Chamberlain*, above noticed, the premises consisting of a principal building with a barn, storehouse, and out-houses appurtenant thereto, were held to be a homestead, although the principal building was used as a ho-

<sup>1</sup> 16 Cal. 184.

tel as well as a dwelling for the family, it appearing that the land had been pre-empted and the building originally intended as a residence for the family, and that the nature and extent of the hotel-keeping did not interfere with the general character of the premises as a family dwelling-place.

In the case of *Gregg v. Bostwick*,<sup>1</sup> it is said: "If the premises are used also as a place of business by the family, as not unfrequently happens, they do not therefore cease to be a homestead, if they are necessary or convenient for family use independent of the business." And this seems to be the true test, whether premises used partly for business are homestead or not; if necessary or convenient for family use, they may be homestead; if otherwise, not."

**§ 80. In Massachusetts, homestead premises may be used for business purposes, and it is held that the right may exist in a country hotel.<sup>2</sup>**

**§ 81. Used only for business, not exempt—Owner may combine both business and dwelling.**—In Texas it is held that a place of business used only as such does not come within the provisions of the law,<sup>3</sup> but the exemption should not be construed as reserving merely a residence where a family may eat, drink, and sleep; it includes also a place where the head or members may pursue such business or avocation as may be necessary for the support and comfort of the family. "The office of a lawyer or shop of a mechanic is necessary to the convenience and success of their respective profession or trade, but it would frequently be of much inconvenience and detriment that this shop or office should be part of the same building, or even on the same lot with the residence of the family, and so it may be on a separate lot at a distance from the residence, and will still be protected."<sup>4</sup> Although this latitude is allowed, and this liberal interpretation is given

<sup>1</sup> 33 Cal. 228; *Rhodes v. McCormick*, 4 Iowa 368; *Gary v. Eastabrook*, 6 Cal. 457.

<sup>2</sup> *Lazell v. Lazell*, 8 Allen 575; *Mercer v. Chase*, 11 Allen 194.

<sup>3</sup> *Phitteo v. Smalley*, 23 Texas 502; *Franklin v. Coffee*, 18 Texas 413.

<sup>4</sup> *Pryor v. Stone*, 19 Texas 373; *Stanley v. Greenwood*, 24 Texas 224; *Moose v. White*, 30 Texas 440.



to the law, yet the Court says: "It is not enough to support a homestead claim that he uses the premises for business purposes and sleeps there; it must be a place where he lives, where he furnishes himself, if single, or his family, if he has one, with all such things as are required in the support or sustenance of himself or his family."<sup>1</sup> The exemption guaranteed by the law and the constitution is based on the supposition that there is a homestead in fact in actual existence; that there is a home in which the citizen and his family are or might be settled. "There must be a homestead over which the constitution may throw its shield, and not land merely, upon which the owner may or may not put up his cabin, mansion, or improvements, and claim a home. A homestead necessarily includes the idea of a house for residence, or mansion house; on town or city lots it cannot exceed a certain value."<sup>2</sup>

**§ 82. In Kansas, a homestead and a brewery may exist in the same building, and this, although the greater part of the building is used for brewing purposes.<sup>3</sup>**

**§ 83. Store, warehouse, not exempt.**—In Illinois it would appear that a stable, a horse lot, a smoke house, and the grounds connected therewith, together with the dwelling-house, would constitute the homestead; but that a store, a warehouse, and the grounds connected with these, would not.<sup>4</sup>

**§ 84. Only dwelling and its appurtenances.**—In Iowa, the rule is more stringent than in Texas and other States. It is not to embrace more than one dwelling-house, nor any other buildings except such as are properly appurtenant to the homestead as such; and a shop situated thereon and really used and occupied by the owner in the prosecution of his ordinary business, and not exceeding in value the statutory

<sup>1</sup> *Wilson v. Cochran*, 31 Texas 677.

<sup>2</sup> *Franklin v. Coffey*, 18 Texas 413; *Williams v. Cochran*, 31 Texas 679; *Phileo v. Smalley*, 23 Texas 502; *In re Tertulling*, 2 Dill. 341.

<sup>3</sup> *In re Tertulling*, 2 Dillon 341; see Chapter on Bankruptcy.

<sup>4</sup> *Reinback v. Walter*, 27 Ill. 393; *In re Tertulling*, 2 Dill. 341.



amount, may be appurtenant to such homestead.<sup>1</sup> “When an execution defendant shall use a particular building as a home, the whole of such building in case of controversy and disagreement “will be presumed to constitute and be a part of the homestead until it is shown by the party adversely interested that some specific portion is not of the homestead character, and therefore not exempt.” “And if under the same roof as the homestead \* there shall be a floor or floors, room or rooms, which are not thus used, they are no more exempt than if under another roof, or on another and different portion of the lot. A defendant cannot, by calling his house a homestead, make it such. He cannot, by using one room in a building containing forty, exempt the entire premises.” “In our opinion it was never the intention of the law-making power to exempt from execution an entire building or house, for whatever used, because some portion of it was used by the owner as his homestead. So long as the building shall come within the meaning of a homestead, as defined by the code, the value of it is not limited, though the extent of the ground is. But when not within this definition, it is liable, whatever its value.” And “if a portion of a building shall come within this definition, and a portion not, then a portion may be exempt and another not.” The object of the law is to protect the home, and preserve it for the family, and not shops and stores, rooms, hotels, and office rooms which are rented and occupied by other persons.”<sup>2</sup> The homestead embraces the lots and buildings appurtenant to the house, including those used and occupied by the owner in the pursuit of his ordinary avocation, but it does not include buildings which are rented to others, and produce a revenue for the owner.<sup>3</sup>

**§ 85. In Georgia no restriction is placed upon the use to which the homestead premises may be put.<sup>4</sup>**

<sup>1</sup> *Rhodes v. McCormick*, 4 Iowa 371; *Thom v. Thom*, 14 Id. 49.

<sup>2</sup> *Rhodes v. McCormick*, 4 Iowa 368; *Charles v. Lamberson*, 1 Iowa 435.

<sup>3</sup> *Kurz v. Brusck*, 13 Iowa 579.

<sup>4</sup> *Kirkland v. Davis*, 43 Ga. 318.

§ 86. In Michigan, the same view is taken. "No one would imagine that a person would lose his homestead privilege if he should happen to use some room in his dwelling for his law office, or because his wife should in her own right carry on dress-making in one of the apartments."<sup>1</sup>

§ 87. In Minnesota, no limitation placed on the homestead.—Minnesota sustains the same views, allowing a somewhat broader latitude in the use of the homestead premises than that of Michigan, Wisconsin,<sup>2</sup> and California.

The Supreme Court of Minnesota says, in substance, that it is to be observed that no limitations were imposed by the legislature upon the use which should be made of the homestead of eighty acres, or one lot, provided only it was the dwelling-place of the person claiming the exemption; as to the balance beyond what was required for the site of his house, the homestead tenant seems to have been left free to do what he liked with it, to let it remain unimproved and vacant, or to devote it to any use he pleased—to let it, for instance. He may carry on his own business there, and let the parts which he does not occupy to other men of business, and the whole will be exempt if he lives on the lot, (if in a town) or on the parcel of eighty acres, if in the country.<sup>3</sup> A homestead estate may be taken to include an entire dwelling-house, although a portion of the same is occupied by a third person paying rent therefor to the owner.<sup>4</sup>

§ 88. No limitation on the use—Lodging house.—In Nevada, the statute of 1861 exempts from forced sale a tract of land on which the homestead is located, to the extent of \$5,000 in value; it also provides that no division of the homestead property shall be made without the assent of the owner, where it consists of one acre or less. The debtor has, therefore, the privilege of selecting any land included in the homestead tract, provided it does not exceed \$5,000 in value. There is no limit or qualification as to the other uses to which

<sup>1</sup> *Orr v. Shraft*, 22 Michigan 260.

<sup>2</sup> *Casselman v. Packard*, 16 Wis. 115.

<sup>3</sup> *Kelly v. Baker*, 10 Minn. 154.

<sup>4</sup> *Mercer v. Chace*, 11 Allen (Mass.) 194.

the land may be put, if one use it for a homestead,<sup>1</sup> even though the premises are divided by an imaginary line, the dwelling-house situated on one portion and a livery stable on the other. Real estate worth less than the statutory limit, on which a husband and wife reside, is exempt from execution, although the husband has formerly rented the house thereon for a lodging-house, and has conveyed the premises in trust for his wife, who, however, has never assented to such conveyance in the manner prescribed by law ; and although he does not assert his own claim to the premises as a homestead, or is estopped from so doing, the wife may still make her claim thereto.<sup>2</sup>

**§ 89. Increase of homestead to prescribed value or quantity.**—A homestead may be of any value or any quantity less than the prescribed value or quantity, under any given statute. If the homestead be of less value or of less quantity than the statutory allowance, it may be increased to the maximum value or quantity.<sup>3</sup>

**§ 90. Only that which is occupied and used as homestead is exempt.**—If a party occupies a homestead of less value than the statutory amount, while he has other real estate that is rented to tenants, it is only that which is occupied as a homestead which is exempt.<sup>4</sup>

So in Michigan, where the owner of a town lot built upon it in such a way as to show that he designed it for two families and not for one, and leased one portion and lived in the other, it was held that the leased part could not properly be regarded as his homestead nor exempt from execution ; that the law did not exempt property to the amount of \$1,500, whether designed as a homestead or not ; it merely covered as much as came within the designation "occupied by the family," although worth but a trifle. The object is to preserve

<sup>1</sup> Clark v. Shannon, 1 Nev. 568.

<sup>2</sup> Goldman v. Clark, 1 Nev. 607.

<sup>3</sup> Thom v. Thom, 14 Iowa 49 ; Richards v. Helms, 38 Texas 445 ; Baylor and Dawson v. San Antonio Nat. Bank, 38 Texas 448.

<sup>4</sup> Hart v. Webb, 36 N. H. 158 ; Dyson v. Shealy, 11 Mich. 527 ; Casselman v. Packard, 16 Wis. 116.

the home, and no more.<sup>1</sup> But where a householder has his dwelling-house upon a town lot, and is farming the lot together with a tract of land adjoining, all in one inclosure, it is competent for him to show that the whole premises constitute his homestead.<sup>2</sup>

**§ 91. Occupancy of homestead of greater value than the statutory allowance.**—A person who is in debt and living on land which he claims as a homestead, but which is worth more than the statutory limit, is liable to have the overplus sold on execution. If the land can be divided in conformity with the statute, a certain portion worth the amount in value allowed the debtor, under the particular statute, may be set off, which he can hold exempt. But if in the course of time the portion so allotted to him has so increased in value as to be worth more than the statutory limit, the homestead may be divided a second time and the overplus again sold for the satisfaction of creditors, and this course may be pursued as often as the homestead increases in value and remains divisible; but if indivisible the whole may be sold by the creditor upon the payment to the homestead claimant of the amount exempt by law.<sup>3</sup>

**§ 92. Limit in quantity or value.**—In some States, it will have been seen, the exemption does not exceed a certain quantity of land, while in others the exemption is limited to a certain value. Where quantity is made the limit, the homestead may consist of the whole quantity named, or less. The same where value is made the limit, the homestead may reach in value the figure named, or less. In the case of *Gregg v. Bostwick*, Sanderson, J., in delivering the opinion of the Court, says: <sup>4</sup> “Hence, neither quantity nor value can be taken into account as tests as to what the homestead is, in fact, in a given case; for they, in no just sense, enter into the definition of a homestead. They operate only as limitations. If the

<sup>1</sup> *Dyson v. Shealy*, 11 Mich. 527; *Casselman v. Packard*, 16 Wis. 115.

<sup>2</sup> *Thornton v. Boyden*, 31 Ill. 200.

<sup>3</sup> *Stubblefield v. Graves*, 50 Ill. 110; *Walters v. People*, 21 Ill. 178; *Gregg v. Bestwick*, 33 Cal. 227; *McDonald v. Badger*, 23 Cal. 393.

<sup>4</sup> 33 Cal. 226.

homestead, when ascertained, exceeds the quantity named where limitation is by quantity, it must be reduced by cutting off the excess ; or if it exceeds the value named, where the limitation is by value, it must be divided, if that can be done ; if not, it must be sold and the proceeds divided."

In Texas, the Constitution of 1869 provides that the legislature shall have power to exempt the homestead of a family not to exceed two hundred acres of land, (not included in any town or city) or any town or city lot or lots, in value not to exceed \$5,000, "which shall not be subject to forced sale." The laws provide that there shall be reserved to every citizen, head of family or householder, citizen of the State, a homestead, (as in the Constitution of 1869) from forced sale of the value of \$5,000, "at the time of their destination as such homestead, nor shall the subsequent increase in the value of the homestead, by reason of improvements or otherwise, subject the same to forced sale." <sup>1</sup>

**§ 93. Change of character of homestead from rural to urban.**—In those States where the statute prescribes a cer-

<sup>1</sup> Laws of Texas, 1870, 1873, p. 64.

NOTE.—Paschal's Laws, 1870. The restriction of the urban homestead to the value of \$2,000, including improvements, continued in Texas under the then constitution until 1869. An attempt had been made by the legislature, in 1860 and in 1866, to render the subsequent increasement in the value of the homestead, by reason of improvements or otherwise, exempt from forced sale ; but these acts were declared unconstitutional. They were nugatory, because they were in conflict with the existing constitution, which provided that the homestead should not exceed \$2,000 in value (*Walker v. Darst*, 31 Texas 681). "This opinion," says the reporter, "pronounced in the face of the constitution, which gave the power to the legislature to exempt the property of families, and of the two statutes making such exemption of improvements, must have induced the convention of 1868-69 to leave no doubt in the constitution which made organic what the legislature had twice declared."

The 15th Sec. of Art XII of the Constitution of 1869 reads as follows: "The legislature shall have power, and it shall be their duty, to protect by law from forced sale a certain portion of the property of all heads of families. The homestead of a family, not to exceed two hundred acres of land, not included in a city, town, or village, or any city, town, or village lot or lots not to exceed \$5,000 in value at the time of their destination as a homestead, and without reference to the value of any improvements thereon, shall not be subject to forced sale for debts," etc.

Virtually a homestead in a town may, now, therefore, be of any value whatever, provided that the land did not cost more than \$5,000 at the time it was first adopted as a homestead.

tain quantity in the country for farming purposes, and in villages, towns, and cities a smaller quantity for residence purposes, as well value as amount, some conflict of opinion has arisen as to whether the character of a rural could be changed into an urban homestead. The Supreme Court of Texas said, in the case of *Taylor v. Boulware*:<sup>1</sup> "We are not disposed to question the power of the legislature to extend the limits of a town, nor to question that after the plat or plan of the town shall have been extended corresponding with the boundaries so authorized to be extended, a homestead falling within such extension, though acquired before it was done, would work a change in the character of the homestead from a country to a town homestead, and subject necessarily to the value limitation placed upon city homesteads by the constitution. But in the subsequent case of *Basset v. Messner*,<sup>2</sup> the same Court held different views. In this case it was held that the extension of a town so as to include a rural homestead did not, and under the constitution, could not, change the character of the homestead from a country to a town homestead, and that even could the tacit or actual consent of the proprietor be obtained, his wife's consent must be given in the manner required by statute, before the character of the homestead could be changed.

So, in Iowa, the same principle is maintained as that expressed in this last mentioned case in Texas. "The homestead right having once legally attached, it cannot be taken away without the consent of the owner." Therefore, if a city, town, or village extends its corporate limits so as to make a rural homestead part of such village, the premises do not thereby lose their homestead character, neither is the homestead cut down to one-half acre in extent. It remains, to all intents and purposes, the same as before, provided it does not exceed the statutory value.<sup>3</sup>

<sup>1</sup> 17 Texas 78.

<sup>2</sup> 30 Texas 604; 38 Texas 425. The principles in the foregoing case were affirmed in *Nolan v. Reed*, where it is held that extending the boundaries of the corporation did not change the homestead from a rural to a town homestead; nor did the erection of houses for rent on the land subject it to forced sale.

*Finley v. Deitrick*, 12 Iowa 518, Wright J. dissenting.

**§ 94. Extension of town destroys the character of rural homestead.**—In Wisconsin, a homestead used for agricultural purposes only, and exempt from forced sale under the Act of 1849, was incorporated within the limits of the city of Racine by a subsequent act of the legislature, against the wishes of the owner, who continued to cultivate in the same manner as before, and to use it for his homestead. The Court held that after its incorporation with the city, the law exempting agricultural lands not included within any town plot, or city, or village, no longer applied to it.<sup>1</sup> Differing with the two last cases cited from Iowa and Texas, and agreeing substantially with the first case in Texas.

**§ 95. Reduction of homestead by extension of town.** In Kansas, the same view has been taken, holding that if the corporate limits of a town or city are extended so as to include a part or all of the claimant's homestead property, his homestead is so much reduced in extent. If the corporate limits of the city were so extended as to include the whole of his rural homestead, his homestead would be reduced to one acre.<sup>2</sup> If the extension of the city limits included only a part of his rural homestead, it seems that he would be at liberty either to select one acre as an urban homestead or to retain his former rural homestead—less the portion which the limits of the city covered, which portion would then be subject to forced sale on execution.<sup>3</sup>

**§ 96. A person cannot have two homesteads, one in the city and one in the country.**<sup>4</sup> Nor can he have two, either of which at his election will be exempt.<sup>5</sup>

**§ 97. There is an apparent exception to this rule, which may arise, under certain circumstances.** It has been held

<sup>1</sup> Bull v. Conroe, 13 Wis. 233; Parker v. King, 16 Wis. 223.

<sup>2</sup> The constitution and statutes of Kansas exempt a homestead to the extent of 160 acres of farming land, or of one acre within the limits of an incorporated town or city occupied as a residence of the family of the owner.

<sup>3</sup> Sarahas v. Fenlon, 5 Kansas 592.

<sup>4</sup> Id. 5 Kansas 596.

<sup>5</sup> Wright v. Dunning, 46 Ill. 271; Tourville v. Pierson, 39 Ill. 446.



that where the Probate Court has set apart a homestead for the benefit of the widow and minor children, such widow subsequently marrying is not precluded from acquiring homestead rights in the property of her second husband, while holding the homestead acquired by the first marriage.<sup>1</sup> This is in harmony with the general policy of the law, that the homestead is for the benefit of the family, "not for the husband and wife alone." The children of the former marriage would have no interest, as such, in the new homestead, while the children of the second marriage would have no interest in the homestead set apart by the Probate Court.

**§ 98. The growing crop on land set apart as a homestead** is not liable to be taken on execution.<sup>2</sup> Ordinarily the sale of land carries with it the crop then growing on it; but the laying aside of the homestead is not exactly a sale. It is an appropriation of land for the benefit of the family, to the exclusion of the debts of the head, and does not carry with it the crop then growing on the land, to the exclusion of a lien granted by the husband on such crop.<sup>3</sup>

In Vermont, the growing crops are held to be exempt, but under special statute of 1849, which says: "The homestead of the execution debtor, consisting of the lands, dwelling-house occupied by him as a homestead, and out-buildings, and the yearly produce thereof."<sup>4</sup>

**§ 99. Exchange of homestead, or exempt property, for merchandise.**—The exchange of the homestead for articles of merchandise, or other commodities of a commercial character, will not be permitted—such merchandise or commercial commodities so received in exchange will be liable to be taken on execution."<sup>5</sup>

**§ 100. An exchange may be made of one homestead for another,** in Iowa, where they are of the same value, or

<sup>1</sup> *Higgins v. Higgins*, 46 Cal. 259.

<sup>2</sup> *Marshall & Co. v. Cook*, 46 Ga. 302.

<sup>3</sup> *Clements v. Lee*, 47 Ga. 626.

<sup>4</sup> *Jewett v. Guyer*, 38 Vt. 217.

<sup>5</sup> *Friedlander v. Mahony*, 31 Iowa 311.



less, or if the new homestead be of greater value than the old, it will be exempt to the extent of the value of the old. In other words, in all cases where the old homestead would be exempt, the new one would be exempt to that extent.<sup>1</sup>

**§ 101. So of the sale of a former homestead and the purchase of a new one,** the avails of such former homestead are exempt from execution for prior debts contracted before the purchase of the second homestead, but otherwise liable if not the result of the sale or exchange of former exempt property.<sup>2</sup>

**§ 102. Insurance money due on the destruction of the homestead by fire,** is not liable to levy or attachment in the hands of the insurance company, but is protected the same as the house would have been, if not destroyed ; and this upon general principles, even though the statute is silent upon the subject. Thus, where, on the 31st of March, 1871, a homestead was duly selected, as provided by law, worth less than the statutory value ; on the 11th of March, 1873, a policy of insurance was effected on the premises. On the 5th of June, 1873, the house was destroyed by fire. On the 17th of Sept., 1872, a judgment was duly recovered against the insured, and on the 7th of June, 1873, an execution was issued by virtue of which the sheriff levied on the money due from the insurance company. The wife of the insured, upon affidavits setting forth the facts, moved the Court to set aside the levy. The Court ordered the levy and garnishment, upon the said money in the hands of the insurance company, set aside, and the money discharged from the levy, execution, and garnishment. Upon appeal to the Supreme Court the order was affirmed, that Court holding that the sum due from the insurance company was not subject to garnishment by a creditor of the husband.<sup>3</sup>

<sup>1</sup> *Furman v. Dewell*, 35 Iowa 170.

<sup>2</sup> *Farra et als. v. Quigley*, 57 Mo. 284 ; *Pearson v. Minturn*, 18 Iowa 36 ; *Black v. Epperson*, 40 Texas 163, 187.

<sup>3</sup> *Houghton v. Lee*, case No. 4086, filed July 13th, 1875, Supreme Court Cal. July Term 1875.

## CHAPTER V.

## OUT OF WHAT IT MAY BE SELECTED OR CARVED.

**§ 103. The nature and character of the estate or right** or interest in the land on which the homestead may be based, varies in different States in the nature of the ownership, or title to the land, or the right to demand title or interests in the land, as well as in the value exempted ; but a substantial agreement pervades the laws of all the States in requiring the occupancy of the premises as the family home, before or at the time of such selection.

Most of the statutes provide that the homestead shall consist of a certain quantity of land, with the dwelling-house thereon. In such case a homestead right cannot be successfully asserted when the claimant has no interest in the land.<sup>1</sup> Thus, in Michigan, it was held that a party cannot legally claim, under the statute of 1848, the homestead exemption unless he is both owner and occupant of the premises sought to be exempted, such being the express condition on which the law protects a debtor in the enjoyment of his homestead.<sup>2</sup>

**§ 104. Not limited in choice to the government survey or imaginary lines.**—The owner of a large tract of land in which a homestead right exists, is not limited in his choice of a homestead to the particular forty acres—the statutory limit—according to the government survey, on which his house stands. His house might stand on one plat of forty acres, and his barn and out-houses on another. He is entitled

<sup>1</sup> *Smith v. Smith*, 12 Cal. 216, 225 ; *Beecher v. Baldy*, 7 Mich. 501 ; *Farmer v. Simpson*, 6 Texas 303 ; *Shepherd v. White*, 11 Texas 346 ; *Pizzala v. Campbell*, 46 Ala. 35 ; *Brown v. Keller*, 32 Ill. 154.

<sup>2</sup> *Wisner v. Farnham*, 2 Mich. 472 ; *Revalk v. Kraemer*, 8 Cal. 71.

to have forty acres laid off to him, in the shape most convenient for him, out of any part of his property, provided that the dwelling-house and out-buildings are on the forty acres selected.<sup>1</sup> Where a levy was made on a tract of land containing one hundred acres, and the debtor claimed forty acres off the west side of the south half of the tract as exempt, and it turned out that his dwelling-house was mostly, if not entirely, situate on the north half of the tract, it was held that whether the dwelling-house was in fact situated on the premises thus claimed was not material, and that it would be presumed that he intended by his selection to embrace the dwelling-house and its appurtenances, instead of claiming by any particular government subdivision.<sup>2</sup> Nor do imaginary lines affect the homestead exemption.<sup>3</sup>

**§ 105. The separate property of the husband may become the homestead in California,** as well as the common property acquired after marriage (Code, Sec. 1238, Amend. 1874). His voluntary act in taking his wife to reside upon his separate property makes it his homestead, as well as that of his wife and family, with all the incidents attached to it. Such has always been the rule in California,<sup>4</sup> and is now expressly declared by the Code as above.

**§ 106. But the separate property of the wife cannot** become the homestead of the family without her consent in writing, by joining in making the declaration of homestead (Civil Code, Sec. 1239, Amend. 1874). There is an express provision in the constitution of California, which says that all property of hers acquired before marriage, or if after by gift, bequest, devise, or descent, shall be her separate property, (Art. IX, Sec. 14) and the statute provides that such property can only be alienated or encumbered by the voluntary act in writing of a married woman, and acknowledged in an examination separate and apart, and without the hearing of her husband.

<sup>1</sup> Kent v. Agard, 22 Wis. 150.

<sup>2</sup> Herrick v. Graves, 16 Wis. 157.

<sup>3</sup> Clark v. Shannon, 1 Nev. 568; Walters v. The People, 18 Ill. 194; Gleason v. Edmunds, 2 Scam. 448; Walters v. The People, 21 Ill. 178.

<sup>4</sup> Revalk v. Kraemer, 8 Cal. 66.

“The mere act of the wife of residing with her husband on the premises cannot be construed into a change of her right in regard to her separate property.”<sup>1</sup> But where property is conveyed to a married woman for a valuable consideration, it becomes, not the separate property of the wife, (unless by way of gift from husband of either land or money<sup>2</sup>) but the common property of both husband and wife, and, as such, is entitled to be dedicated to homestead purposes.<sup>3</sup>

**§ 107. In Illinois it seems that a homestead right may attach** to lands of which the wife is the owner in fee, the husband having only an estate as tenant by the curtesy.<sup>4</sup> But the husband and family must reside thereon with her.<sup>5</sup>

**§ 108. In Ohio** it has been held that, where real estate of the wife, held by her (under statute of 1866) as her separate property, is occupied by the husband as a family homestead, he is not the owner of such homestead within the meaning of the statutes relating to the exemption of property from execution.<sup>6</sup>

**§ 109. In Indiana** a debtor cannot claim exemption from levy of land belonging to his wife, or of which she and not he holds the deed.<sup>7</sup>

**§ 110. In Michigan** a man cannot claim as a homestead, under the homestead exemption act, a lot which he has caused to be conveyed to his wife, on the ground that no one but the debtor can claim it. “If it was the wife’s property it was not liable to be taken on execution for his debts; if it was not, her pretended title can be of no avail to him for the purpose of exemption. As owner, she cannot claim it under

<sup>1</sup> *Revalk v. Kramer*, 8 Cal. 71.

<sup>2</sup> *Hussay v. Castle*, 41 Cal. 239; *Woods v. Whitney*, 42 Cal. 361; *Lord v. Hough*, 43 Cal. 581; *Higgins v. Higgins*, 46 Cal. 259; *Dow v. Gould & Curry*, 31 Cal. 629; *Peck v. Brumagim*, 31 Cal. 440.

<sup>3</sup> *Riley v. Pehl*, 23 Cal. 74.

<sup>4</sup> *Boyd v. Cudderback*, 31 Ill. 113.

<sup>5</sup> *Tourville v. Pierson*, 39 Ill. 446.

<sup>6</sup> *Davis v. Dodds*, 20 Ohio St. 473.

<sup>7</sup> *Holman v. Martin*, 12 Ind. 553, see *Bankruptcy*.

the exemption act against his debts—having conveyed it, the title is good between him and her, though void as to creditors, he cannot claim it as exempt, for no title remains in him on which to base such a claim.”<sup>1</sup>

§ 111. In Wisconsin, on the other hand, it has been held that it was immaterial whether the title to the homestead is vested in the householder, or in his wife as his trustee. In either case, it is equally exempt from forced sale. In the case of *Dreutzer v. Bell*,<sup>2</sup> the defendant, Bell, had conveyed his homestead to one P, who reconveyed to Bell’s wife; this was done under the impression that the homestead would be more secure against Bell’s creditors. The Court was of opinion that these conveyances did not operate to defeat the homestead right. “It must be admitted plaintiff could not sell the homestead, had the title remained in Bell. Does the circumstance that the title has passed around into the wife place them in a better position in respect to it than when the whole legal and equitable estate was in him? We cannot see that it does.” The homestead law is for the benefit of the family, the wife and children as well as the head of the family.<sup>3</sup>

§ 112. Some right or title to the land necessary to the right.—A person owning a building, but having no property in the land whereon it stands, cannot maintain any claim of homestead in such building. Title to the land, or a right to demand title or an interest in the land, is essential; so held, against the wife, where the house was erected on land which the husband after his second marriage purchased in the name (by way of advancement) of his children by a former wife, but with funds owned by him prior to his marriage with the wife who set up the homestead claim.<sup>4</sup>

<sup>1</sup> *Hershfeldt v. George*, 6 Mich. 457, see *Bankruptcy*, the recent rule very different.

<sup>2</sup> 11 Wis. 114.

<sup>3</sup> *Volger v. Montgomery et als.*, 54 Mo. 577.

<sup>4</sup> *Smith v. Smith*, 12 Cal. 223; *Deere v. Chapman*, 25 Ill. 610; *Davenport v. Alston*, 14 Ga. 271; *Brown v. Keller*, 32 Ill. 152.

**§ 113. Wrongful possession of homestead creates no title.**—The mere use of the premises as a homestead does not of itself create any interest in the property when the parties claiming the homestead have in fact no title or estate therein.<sup>1</sup> To be in a position to assert any claim to homestead rights in tenements, the individual so claiming must be in the actual possession, but no one holding by a wrongful possession can create any homestead right which can be asserted as against the lawful possessor, though the right is tenable as against the rest of the world.<sup>2</sup>

**§ 114. A homestead right may exist in lands which are held by a less estate than a fee simple,** in fact it may exist where a person has no estate whatever, but a mere naked possession. The homestead right does not depend upon the character of the title held by the party claiming it : it is impressed on the land to the extent of the interest of the claimant in it ; not on the title merely. “The actual homestead, as against everybody who has not a better title, becomes impressed with the legal homestead by taking the proceedings prescribed by the statute.”<sup>3</sup> Whatever interest, therefore, the homestead claimant might have, would be protected from forced sale. In *Brooks v. Hyde*,<sup>4</sup> the same doctrine was held : “We know of no reason why parties, otherwise entitled to the benefits of the homestead law, who are wrongfully in possession, may not shelter the possession under the provisions of the homestead act. By a dedication to homestead use they of course acquire no title to the land which they did not before have, and no additional protection against the claim of the true owner, but as against their creditors the possession of the land is as much protected by the homestead law as if they were invested with the fee-simple. In the solution of all questions arising between homestead claimants and those claiming under or against them as creditors, the absence of title is a false quantity which must be excluded from

<sup>1</sup> *Calderwood v. Tevis*, 23 Cal. 336.

<sup>2</sup> *Mann v. Rogers*, 35 Cal. 317 ; *Brooks v. Hyde*, 37 Cal. 367 ; *Strachn v. Foss*, 42 N. H. 40 ; *McClurken v. McClurken*, 46 Ill. 327.

<sup>3</sup> *Spencer v. Geissman*, 37 Cal. 99.

<sup>4</sup> 37 Cal. 373.

consideration." The same rule has obtained in Illinois. In the case of *McClurken v. McClurken*,<sup>1</sup> just cited, the Court says substantially, a claim of homestead under a mere naked possession without any ownership in the land, or at least a term of years which will not expire at the lessee's death as a basis for such claim, cannot be set up to defeat recovering in ejectment under a paramount legal title.

**§ 115. In Alabama, ownership and occupancy necessary.**—To constitute a homestead under the statutes of that State, the realty in which it is claimed must not only be occupied but owned by the claimant through whom it is claimed. It was held that the widow would not be entitled to a homestead where the husband had only a leasehold estate, and was not the owner of the land.<sup>2</sup>

**§ 116. Right of homestead expires with the term for which held.**—In Illinois, if the homestead exemption attaches to any estate less than a fee, it cannot continue or be claimed after the estate has terminated.<sup>3</sup> The person who, by the provisions of the act, is entitled to its benefits, must be the owner of the premises, whatever may be said of the owner of the term—a life or contingent estate—a person having no interest in the property, or right to its enjoyment, is not embraced in the provisions of the law. So, where a party held premises upon which he resided, under a lease, the term of the lease having expired, his widow was precluded from setting up a homestead right.

**§ 117. Any interest which can be sold on execution.**—The benefits of the homestead law are not confined to an ownership in fee, but attach to the house and lot to which the debtor has such a term as may be sold on execution. The object of the statute was said to be to protect the owner and his family in a home free from sale under judgment or decree, and a tenant for years was as clearly within the reason of the statute as the owner of a larger estate. The law was designed

<sup>1</sup> 46 Ill. 331.

<sup>2</sup> *Pizzala v. Campbell*, 46 Ala. 35.

<sup>3</sup> *Brown v. Keller*, 32 Ill. 154.



to protect estates liable to sale on execution or decree, and a term of years was held to be such an estate,<sup>1</sup> and an owner of a term of years was an "owner" within the meaning of the statute, and his house and leased lot were not subject to attachment, or levy and sale, under an execution, and a purchaser, under a forced sale, can acquire no title to it.<sup>2</sup> And the homestead claim to such leasehold property may be set up after a sale, under a judgment or decree, unless it was released as provided by law.<sup>3</sup> A house, erected upon ground held under a lease, is annexed to and forms part of the leasehold estate. The house is not, of itself, a separate chattel, but it, together with the lease of the land, forms a chattel real, and not being naturally divisible, it is not regular for the sheriff, under a judgment, to sever the house from the term to which it is attached; and generally a sheriff has no power to sell houses, timber, or ornamental trees, or to sever them from the fee. Such a proceeding would be waste.<sup>4</sup> In Massachusetts, Michigan, New Hampshire, Ohio, Wisconsin, Minnesota, Nebraska, Iowa, and other States, the same principle will apply. "A homestead may be claimed in a dwelling-house belonging to the debtor, which stands upon the land of another, by virtue of a lease to the owner of the house."<sup>5</sup> So, in Iowa, a homestead may exist in a leasehold estate for years. In the case of *Peland v. De Bevard*,<sup>6</sup> plaintiff leased one Snow certain premises for the term of five years, for an agreed annual rent. It was further agreed that if Snow should erect a building suitable for a family, and a stable, on the leased premises, the lessor was to pay him, at the expiration of the lease, the value of the same, to be estimated by parties chosen therefor. The lessee made the proposed improve-

<sup>1</sup> *McClurken v. McClurken*, 46 Ill. 327; *Deere v. Chapman*, 25 Ill. 610.

<sup>2</sup> *White v. Clark*, 36 Ill. 285; *Moore v. Titman*, 33 Ill. 358; *Booker v. Anderson*, 35 Ill. 66; *Moore v. Dixon*, 35 Ill. 208; *Silsbe v. Lucas*, 36 Ill. 462.

<sup>3</sup> *Conklin v. Foster*, 57 Ill. 104.

<sup>4</sup> *Id.* 105.

<sup>5</sup> 1 Wash. Real Prop. 337; *Thurston v. Maddocks*, 6 Allen (Mass.) 428; *Kelly v. Baker*, 10 Minn. 154; *Norris v. Moulton*, 34 N. H. 392; *Colwell v. Carper*, 15 Ohio St. 279.

<sup>6</sup> 13 Iowa 53; *Bartholomew v. West*, 2 Dillon 291.



ments, and occupied the house as a homestead. It was held that the owner of a leasehold was entitled to the exemption provided by the statute, because such exemption "was not limited to any particular estate, either as to its duration or extent"; and that being homestead, the right to the possession of the premises, under the lease, could not be assigned by the husband without the concurrence of the wife, in the usual way. And that "an assignment by the husband alone would transfer to the assignee the right to recover of the lessor the value of the improvements at the expiration of the term. Such assignment by the husband would be good without the joinder of the wife, so far as it related to the improvements, because the right of Snow, or his assign, to compensation for his improvements, was not a part of the homestead, but as much capable of transfer and assignment as a promissory note or any other debt against the lessee." <sup>1</sup>

In Mississippi, it is held that the term lands, as used in the statute of that State, which provides that "every head of a family shall be entitled to hold, own, and possess, free from sale under execution, one hundred and sixty acres, not within any city, town, or village, or if within any city, town, or village, lands to the value of fifteen hundred dollars, includes an interest in land for years, for life, or any greater estate of freehold." <sup>2</sup>

In North Carolina, a debtor is entitled to a homestead in an equity of redemption, subject to the mortgage debts, <sup>3</sup> also a reversionary interest in lands is exempt from execution under the homestead law. <sup>4</sup>

The true rule seems to be any interest of the debtor which might be sold on execution. <sup>5</sup>

**§ 118. Leasehold property adjoining homestead, not exempt.**—The term "homestead" would not apply, in some States, to leased property, though it adjoins the premises

<sup>1</sup> 13 Iowa 54.

<sup>2</sup> Johnson v. Richardson, 33 Miss. 462.

<sup>3</sup> Cheatham v. Jones, 68 N. C. 153.

<sup>4</sup> Poe v. Hardie, 65 N. C. 447.

<sup>5</sup> Deere v. Chapman, 25 Ill. 610; Johnson v. Richardson, 33 Miss. 462; Bartholomew v. West, 2 Dillon 291.

used as a homestead, when such leased property is occupied by tenants, and was never occupied as a home by the owner. And property thus leased constitutes no part of the homestead, even though the homestead proper does not equal the value allowed by statute.<sup>1</sup>

**§ 119. Homestead right in equitable interest.**—Different rules are applied in different States in respect to the nature and extent of the equitable ownership of property requisite in respect to which the homestead exemption will apply. In Illinois, one who holds an equitable title to land under a contract to purchase, is sufficiently an owner of such land, within the meaning of the homestead law, to claim the exemption. He holds that species of estate to which the homestead right will attach, and which will be protected from levy and sale, as against third persons; “and whether the debtor holds in fee-simple, for life or for a term of years, the reasons for affording the exemption apply with equal force.”<sup>2</sup> While in Massachusetts it has been held that the right does not attach until the owner has a deed of the estate, nor would it retroact to the date of the bond under which the conveyance is made, though the deed be delivered in accordance with its provisions.<sup>3</sup> Whereas, in Iowa, where the owner of a homestead took possession of an adjoining tract of land under a parol contract of purchase, and improved the same as part of the homestead, it was held exempt from judicial sale to satisfy a debt contracted after such purchase, but before an actual conveyance of the property to the debtor.<sup>4</sup>

In Michigan, a homestead may be claimed where a party is in possession of land under an executory contract to purchase. In such case, the purchaser, if a married man, cannot alienate his interest without the concurrence and signature of his wife, for the reason that equity considers that as done which the

<sup>1</sup> *Hoitt v. Webb*, 36 N. H. 158; *Davis v. Andrews*, 30 Vt. 678; *Walters v. People*, 18 Ill. 194; as to occupancy by tenant, 21 Ill. 178; 7 N. H. 245; 23 Ill. 536.

<sup>2</sup> *Blue v. Blue*, 38 Ill. 10; *McManus v. Campbell*, 37 Texas 267; *McKee v. Wilcox*, 11 Mich. 358; *McManus v. Campbell*, 32 Texas 442.

<sup>3</sup> *Thurston v. Maddocks*, 6 Allen 428.

<sup>4</sup> *Fyffe v. Beers*, 18 Iowa 4.

parties had agreed to do, and gives the same effect to the equitable estate that the law gives to the legal estate.<sup>1</sup>

In Texas, homestead rights attach whenever there is a dedication of the property to homestead purposes; and this may be before the fee passes, or before the purchase-money is fully paid, subject, however, to the vendor's lien.<sup>2</sup>

**§ 120. As to lands held in joint tenancy and in common,** a different rule prevails in different States, irrespective of statutory regulation, in allowing the right of homestead in such tenures. The right is allowed, among others, in Illinois, Iowa, Arkansas, Texas, and Vermont, while among those in which the right is denied may be mentioned California,<sup>3</sup> Indiana, Massachusetts, New Hampshire, and Wisconsin.

As the homestead is protected in a simple possessory claim, a leasehold, or life interest, or equitable title,<sup>4</sup> as well as the legal title, no satisfactory reason has been assigned why the rule in the foregoing States of Illinois, Iowa, Vermont, Texas, and Arkansas should not prevail, being in harmony with the object and policy of the homestead laws existing in the several States, and with the rule "any interest which might be sold on execution."

Besides, a parol partition between tenants in common, when followed by a several possession in conformity therewith, will so far bind the possession as to give to each cotenant the rights and incidents of an exclusive possession of his property.<sup>5</sup> The legal title might not perhaps be considered as passing by such parol partition, unless after an exclusive possession sufficiently long to justify the presumption of a deed under the limitation act; yet the parol partition followed by a several possession would leave each cotenant seized of the le-

<sup>1</sup> McKee v. Wilcox, 11 Mich. 358.

<sup>2</sup> McManus v. Campell, 37 Texas 268.

<sup>3</sup> Statutes of 1868 allowed homestead in lands held in common, but abrogated by Code, 1873.

<sup>4</sup> See Ante, Secs. 114, 116, and 117.

<sup>5</sup> Wash. on Real Prop. 3d ed. 587; Wood v. Fleet, 36 N. Y. 501; Robinson v. McDonald, 11 Texas 385; Coburn v. Ellenwood, 4 N. H. 99; Folger v. Mitchell, 3 Pick. 396; Adams v. Frothingham, 3 Mass. 352; Corbett v. Norcross, 35 N. H. 99; Rothwell v. Dewees, 2 Black 613; Tomlin v. Hillyard, 43 Ill. 300.

gal title of his proportion of his allotment, and the equitable title to the other portion, and from his cotenant he could compel, by bill in equity, a conveyance of the legal title of that portion, according to the terms of the partition. When a parol partition between tenants in common is had, followed by a several possession, and before any judgment lien has attached,<sup>1</sup> there is no reason why each cotenant cannot claim the homestead right, even though the legal title to one portion of his allotment be in the other, as each holds it after such partition as trustee for the other. And a mere severance of possession by tenants in common may be inferred from far less proof than would be required to show a sale of land to a stranger.<sup>2</sup>

**§ 121. Homestead may be acquired in lands held in joint tenancy.**—The Supreme Court of Texas has repeatedly held that a tenant in common of real estate may establish upon such lands his homestead, without prejudice to his cotenants; and on partition, equity will allot to such improving tenant his homestead, whenever that can be done without injury to the other owners.<sup>3</sup>

**§ 122. In Iowa, a tenant in common may claim and hold a homestead in his interest in the undivided premises.** In the case of *Thorn v. Thorn*,<sup>4</sup> the Court says: “We do not see why the homestead may not be awarded to the proper owner as tenant, without the slightest detriment to his cotenants. Independently of any homestead right, it has been held by some Courts, that where one of the joint tenants had made valuable improvements, that on partition subsequently made, he would be entitled to that part on which improvement had been made, or to compensation.<sup>5</sup> But the homestead right “cannot be claimed and enforced by one tenant in common to the detriment of his cotenants. Hence, if he should happen to have erected and occupied a homestead on a piece of

<sup>1</sup> *Reynolds v. Pixley*, 6 Cal. 165.

<sup>2</sup> *Tomlin v. Hilyard*, 43 Ill. 300.

<sup>3</sup> *Williams v. Wethered*, 37 Texas 132; *Smith v. Deschaumes*, Id. 429.

<sup>4</sup> 14 Iowa 49.

<sup>5</sup> *Robinson v. McDonald*, 11 Texas 385.

land which could not be partitioned without great prejudice to his cotenants, it would have to be sold, but in that event the Court would see that the value of the homestead and improvements distinct from the land would be secured to the party at whose expense and labor they had been made."

**§ 123. In Arkansas, where lands held in common are levied on, a tenant in common is at liberty to apply for partition, and after partition, by fixing his dwelling thereon, he will be entitled to the benefit of the exemption law. The Court said: "We are aware that it has been held, in California, that a homestead cannot be claimed by a tenant in common, on the ground that no provision is made by the homestead statute of that State for partition.<sup>1</sup> But it has been ruled otherwise in Iowa and in Vermont,<sup>2</sup> and we prefer the reasoning of these decisions."<sup>3</sup>**

**§ 124. Right of homestead in lands held in common.—**In Vermont, in discussing the right of homestead in lands held in common, the Supreme Court says: "There is nothing in the nature or policy of the exemption which makes it any more applicable to property of which the husband or head of family is the sole and absolute owner than the property in which he owns an undivided share as tenant in common with others."<sup>4</sup>

**§ 125. Homestead cannot be acquired in land held in joint tenancy.—**The contrary rule obtains in Wisconsin and in California, where land held in joint tenancy, or tenancy in common, is not susceptible of dedication to homestead uses; the homestead, within the meaning of the statute relating to that subject, must be owned by the claimant in severalty. "A careful examination of the homestead law seems necessa-

<sup>1</sup> *Wolf v. Fleischaeker*, 5 Cal. 244; *Giblin v. Jordan*, 6 Cal. 417; so in *Indiana* and *Massachusetts*, 1 Wash. on Real Prop. 338.

<sup>2</sup> 36 Vt. 254, 257.

<sup>3</sup> *Greenwood v. Maddox*, 27 Ark. 648-660; sustaining this view are *Horn v. Tufts*, 39 N. H. 483; *Thorn v. Thorn*, 14 Iowa 53; *McClary v. Bixby*, 36 Vt. 254; *Robinson v. McDonald*, 11 Texas 385.

<sup>4</sup> *McClary v. Bixby*, 36 Vt. 257.

rily to lead to the conclusion that an undivided interest in real estate is not, as such, susceptible of such an ownership and occupancy as the law contemplates in order to constitute a homestead. The occupant need not have a perfect title ; but whatever his interest may be, the occupancy, in order to constitute a homestead, must be of some specific portion capable of being set apart by metes and bounds, and thus separated from that which is not exempt." "In all cases where the amount of land is large enough to leave the debtor more than the quantity exempt from execution, it would be practically impossible to apply the provisions of the exemption law to an undivided interest, and if this be so, it shows that the State intends that the claim of a homestead shall be made only in respect to that which the party owns and occupies in severalty. This view of similar statutes has been taken in the following cases, and it seems to us impossible to avoid that result." <sup>1</sup>*a*

**§ 126. No right of homestead in such lands in California.**—As will have been seen, in California a homestead cannot be carved out of lands held in joint tenancy or tenancy in common ; or out of land held by a firm as partnership assets. In the leading case of *Wolf v. Fleischacker*<sup>2</sup> the defendant was the owner of an undivided one-third in a tract of land, he having jointly purchased with two others. The Court said : "It required the title of three to constitute an ownership to the land, and there was no part of it which he had the power to set apart as his own so as to constitute a homestead. The right of the other joint tenants was as great to the whole as his own right. The law did not contemplate that homesteads should be carved out of land held in joint tenancy or tenancy

<sup>a</sup> Citing *Wolf v. Fleischacker*, 5 Cal. 244 ; *Giblin v. Jordan*, 6 Cal. 416 ; *Elias v. Verdugo*, 27 Cal. 418 ; *Thurston v. Maddocks*, 6 Allen 427.

<sup>1</sup> A homestead right cannot be originally acquired in land held by the claimant in common with a stranger, *Thurston v. Maddocks*, 6 Allen 427.

<sup>1</sup> *West v. Ward*, 26 Wis. 579.

<sup>2</sup> 5 Cal. 244 ; *Elias v. Verdugo*, 27 Cal. 418 ; *Reynolds v. Pixley*, 6 Cal. 167 ; *Kellersberger v. Kopp*, 6 Id. 565 ; *Bishop v. Hubbard*, 23 Id. 517 ; *Ward v. Huhn*, 16 Minn. 161 ; *Thurston v. Maddocks*, 6 Allen 429 ; *Kingsley v. Kingsley*, 39 Cal. 665.

in common, because it does not provide any mode for their separation and ascertainment."

This doctrine was affirmed in the cases above cited, as well as in *Seaton v. Son*.<sup>1</sup> In this last case the Supreme Court of California hold that even when the joint tenant or tenant in common is in the exclusive possession of the premises, he cannot carve a homestead out of such land so owned and held. Although the claimant owned seventeen-eighteenths, and supposed that he did, and always claimed to, own the whole.

The rule in California has been carried to the extent that, where land is held by a husband, wife, and child, as tenants in common, it is not subject to homestead rights.<sup>2</sup> But in New Hampshire, where the husband conveys an undivided half of the homestead property, and his grantee enters into possession of a portion of the land so conveyed, the homestead will be limited to the portion so occupied as a homestead; if possession be not abandoned, such sale by the husband does not waive the homestead right.<sup>3</sup> In the case of *Kellersberger v. Kopp*,<sup>4</sup> it was determined that a homestead right was destroyed by a conveyance of an undivided portion, though the grantor and grantee occupied, as their respective homes, different parts of the same building.

**§ 127. It seems difficult, in view of the object and policy of the law,<sup>5</sup> to reconcile the construction of the law in relation to joint tenants, and tenants in common, with that which permits a mere wrongful possessor to avail himself of the benefits of the homestead exemption. It seems strange to say that a joint tenant, in exclusive possession, is worse off than a wrongful possessor. The former has a good legal title and right to occupy the whole of the land; the latter is a mere trespasser. Stranger still is the rule in the foregoing case of**

<sup>1</sup> 32 Cal. 481; as well as in *Cameto v. Dupuy*, 47 Cal. 79.

<sup>2</sup> *Giblin v. Jordan*, 6 Cal. 416. On similar facts, decided the other way, see case in *Greenwood v. Maddox*, 27 Arkansas 660; see also *McClary v. Bixby*, 36 Vt. 257.

<sup>3</sup> *Horn v. Tufts*, 39 N. H. 478.

<sup>4</sup> 6 Cal. 563. By statute of 1868, homesteads may be claimed in lands held in joint tenancy.

<sup>5</sup> *Supra*, Secs. 1 to 16.



*Giblin v. Jordan*,<sup>1</sup> where the property is owned exclusively by the very persons, the constituents of a family in the full sense of the word, for whose benefit, according to the universal opinion of all Courts, the homestead exemption law was enacted.

In the case of *Greenwood v. Maddox*,<sup>2</sup> already cited, a brother and two sisters were tenants in common of three hundred and twenty acres (160 acres being the statutory limit of homestead quantity). The brother's interest of one-third was levied upon under execution, and an attempt made to sell that interest. The Court said he (the brother) certainly had the elements out of which he could cause a homestead to be formed, by having the land partitioned, and fixing his dwelling on the share allotted to him.

By comparing the constitutions and statutes of Arkansas and California, in relation to homesteads, it will be found that they are essentially similar. The constitutional and statutory requirements in both States are residence, ownership, and actual occupation. Yet it is held, in the foregoing case, that where lands, held in common, are levied upon, the tenant in common is at liberty to apply for partition, and in the meantime, the execution will be stayed till such partition is effected. The reason assigned in California,<sup>3</sup> to wit: that the statute has provided no mode of separation, and because a division and appraisal would put the other owners to trouble—is not satisfactory. The same reasons will apply to Arkansas, Texas, and Vermont, yet there is a mode pointed out. The common law furnishes a mode of partition in all cases. Creditors could have no just cause of complaint where the debtor is allowed the one-half or one-third of a piece of land equally with him who is fortunate enough to own the whole. Of course, this homestead right could not and need not affect the cotenant's rights, but the right of exemption might be maintained against the balance of the world. The reason assigned in Wisconsin,<sup>4</sup> that "where the amount of land is large enough

<sup>1</sup> 6 Cal. 416.

<sup>2</sup> 27 Ark. 660; *Williams v. Wethered*, 37 Texas 131; *McClary v. Bixby*, 36 Vt. 257.

<sup>3</sup> 5 Cal. 244.

<sup>4</sup> *West v. Ward*, 26 Wis. 579.



to leave the debtor more than the quantity exempt from execution, it would be practically impossible to apply the provisions of the Exemption Law to an undivided interest," presents no greater difficulty than was presented in the Arkansas case, and overcome under a statute in every way similar.

The reasoning in *Calderwood v. Tevis*, 23 Cal. 335; in *Brooks v. Hyde*, 37 Cal. 373, and in *Spencer v. Geisseman*, 37 Cal. 99, would naturally apply with as much, if not more force, to joint or common tenancies, as to a simple possessory claim, or perhaps trespass. There does not seem to be any good reason why the same rule should not apply in cases of joint tenancies and tenancies in common, that is applied to leasehold, life, or equitable estates, to wit: "any interest of the debtor which might be sold on execution."<sup>1</sup>

**§ 128. Satisfactory rule in Texas.**—In the case of *Smith v. Deschaumes*<sup>2</sup> the Supreme Court of Texas lays down the rule which seems the most satisfactory, to wit: that a tenant in common can, with the consent of his cotenant, acquire a homestead in the common property against all the world except his cotenant.

**§ 129. Separate parcels of land composing the homestead.**—A great diversity of opinion exists among the authorities as to whether the homestead right may be carved out of separate and distinct parcels of land, or whether such land must form a compact body.

**§ 130. In Texas, the homestead in a city or town is not limited to one lot.** It may extend over any number of town or city lots necessary to the convenience and comfort of the family. The limitation is not to their number, but to their value, and it is not material how many lots were required for the purposes of the family, provided the lots and improvements did not exceed in value the statutory amount.<sup>3</sup> Nor is it necessary that the lots shall adjoin, or be contiguous

<sup>1</sup> *Deere v. Chapman*, 25 Ill. 610; *Johnson v. Richardson*, 33 Miss. 462.

<sup>2</sup> 37 Texas, 429, 430.

<sup>3</sup> *Hancock v. Morgan*, 17 Texas 585; *Williams v. Jenkins*, 25 Texas 279.

to each other. All that is required to entitle the property to exemption from forced sale is, that it should be used for the convenience or uses of the head or members of the family.<sup>1</sup> But a vacant lot, perfectly distinct from the homestead, and separated by a street from the residence of the family, and wholly unimproved, which was never used, and was probably never intended to be used as part of the homestead, was held not to be exempt from forced sale. There was nothing to associate it or connect it in any way with family uses.<sup>2</sup>

A homestead in the country may consist of separate parcels of land ; the two hundred acres need not lie in one body, and a homestead already acquired, which is smaller than the maximum allowed by law, may be increased up to such maximum, and the addition, provided it be useful or convenient for the family, becomes part of the homestead, and as such will be protected from forced sale.<sup>3</sup>

**§ 131. May be of one or more lots, but must be occupied and used.**—In California, the homestead, “if situate in the country, may include a garden or farm ; if situate in a city or town, it may include one or more lots, or one or more blocks.” In either case, whether it be rural or urban, “it is unlimited by extent merely.” “It need not be in a compact body: on the contrary, it may be intersected by streets, alleys, or highways. Neither is it circumscribed by fences merely. In respect to quantity alone it is unlimited, whether in town or country. In short, the only tests are use and value. Whatever is used, being necessary or convenient, as a place of residence, as contradistinguished from a place of business, constitutes the homestead, subject to the statutory value.”<sup>4</sup> The homestead for which the statute provides is not one in name merely, but one in fact, and must be actually used as such. In the foregoing case of *Gregg v. Bostwick*, the facts are : that Gregg was married prior to 1850 ; in that year

<sup>1</sup> *Pryor v. Stone*, 19 Texas 371 ; *Ragland v. Rogers*, 34 Texas 617.

<sup>2</sup> *Methery v. Walker*, 17 Texas 593 ; *Wilson v. Cochran*, 31 Texas 677.

<sup>3</sup> *Campbell v. McManus*, 32 Texas 442 ; *Williams v. Hall*, 33 Texas 212.

<sup>4</sup> *Gregg v. Bostwick*, 33 Cal. 227 ; *Estate of Delaney*, 37 Cal. 179 ; approved in *Mann v. Rogers*, 35 Cal. 319, following generally the rule in *McDonald v. Badger*, 23 Cal. 397, as to several lots.

he purchased, and moved with his family upon block eighteen, consisting of lots one, two, three, and four ; and in 1851 he enclosed them, and so continued to reside until 1857 or '58, when he removed with his family, consisting of wife and five children, from his dwelling on lot one, to a house built by him on lot three ; and thereafter, in 1860, they again removed to another house on the northwest corner of lot three. In March, 1862, they regularly executed and recorded their declaration of homestead—under act of 1861 requiring declaration and recording—claiming all of block eighteen as a homestead. At this time there were upon the block so claimed eight buildings, besides the dwelling-house in which they lived, to wit : on lot one a hall, or gymnasium building, or public hall ; upon lot two a storehouse ; upon lot three a dwelling-house, and upon lots four and five dwelling-houses. All of these buildings were occupied by tenants of Gregg.

Held, that his homestead was limited to that portion of lot three, inclosed by the fence, which his family was residing upon and using as a homestead at the time the declaration was made. “The premises to be described in the declaration are such, and only such, as the parties are residing upon and using as a homestead at the time their declaration is made. If more is included, it will not, for that reason, become a part of the homestead, and, therefore, exempt from execution, notwithstanding the whole may be less than five thousand dollars in value.”<sup>1</sup>

#### ONE OR MORE LOTS.

§ 132. In North Carolina, under Art. 10 of the Constitution and Act of 1868–9, it has been held that a homestead may be laid off in two tracts of land, not contiguous, providing they do not exceed the statutory value.<sup>2</sup> Before the Act of 1868, the owner of the land was not restricted by the constitution to the choice of his homestead to the tract upon which

<sup>1</sup> Id. 229.

<sup>2</sup> *Martin v. Hughes*, 67 N. C. 293.

he resided, nor to contiguous tracts, but the same might have been assigned from any land of the required value.<sup>1</sup>

§ 133. In New Hampshire, it has been held that a small piece of land on which hay is cut for a cow kept at the house where a man lives, may be regarded as a part of his homestead, though the land is separate from the house, and a mile distant, provided that the house and land together do not exceed the statutory limit in value, and the land is used in connection with the house to furnish necessary feed for the cow.<sup>2</sup>

§ 134. So in Vermont, where a highway ran through property claimed as exempt, on one side of which was the residence, and on the other a blacksmith's shop, (not used for the purpose for which it was built) with a water privilege, it was held that the whole property was exempt, being within the statutory limit.<sup>3</sup>

§ 135. In Alabama, a debtor may select any portion of his real estate, whether in his actual possession or not, which he may prefer, not to exceed the quantity allowed by law, provided the selection is not unreasonable or capricious. A house on one acre or less might be chosen, with other land entirely apart from it.<sup>4</sup>

§ 136. Massachusetts seems to follow the same rule ; in the case of *Taylor v. Mexter*,<sup>5</sup> it was strongly intimated, though it did not become necessary to determine the point, that the term homestead might include land not contiguous to the dwelling-house if intimately connected and used with it, and also that the "homestead farm" might have a broader signification than the term homestead used alone. The letting of small portions of it for the season, or for short terms, did not sever it from the home ; nor did the intention to sell it for house lots change the character.

<sup>1</sup> *Mays and Parker v. Cotton*, 69 N. C. 289.

<sup>2</sup> *Buxton v. Dearborn*, 46 N. H. 43.

<sup>3</sup> *West River Bank v. Gale*, 42 Vt. 27. But see *Mills v. Estate of Grant*, 36 Vt. 269 ; *True v. Estate of Morrill*, 28 Vt. 672, for contrary opinion in probate matters.

<sup>4</sup> *Melton v. Andrews*, 45 Ala. 454.

<sup>5</sup> 11 Pick. 347.

But a parcel of land distant two miles and more from the homestead residence of the family, used by the owner for pasturing cattle belonging to himself and to others, is not sufficiently connected with the homestead to be exempt from execution.<sup>1</sup>

**§ 137. Stricter rule—Must be in one body.**—On the other hand, a stricter rule is observable, in many of the other States, than those we have been noticing. For instance, in Illinois, it has been held that a tract of land separate from the homestead lot, and not in any way adjoining it, is not a part of the homestead. In the case of *Walters v. The People*,<sup>2</sup> the Court said, that a tract of timber land a mile distant from the homestead, yet necessary for fuel for the use of the farm, etc. is not exempt under the statute. “The language of the act seems to contemplate but one piece of land. The exemption is confined to the lot of ground, and the buildings thereon occupied as a residence.” “There is no provision in the act to make up the value of the homestead to one thousand dollars, by other property, where it falls short in value.” But “two or more adjoining lots might be occupied and used as one lot for a homestead, and might be essentially, so as to be indivisible. I am not able to construe the act as including separate lots and tracts, not even for the purpose of securing so essential an article as fuel.”

But where a householder has his dwelling-house upon a town lot, and is farming the lot, together with a tract of land adjoining, all in the same inclosure, it is competent for him to prove that the whole premises constitute his homestead.<sup>3</sup>

**§ 138. In Wisconsin,** the homestead, while it may consist of two or more adjoining lots, must constitute but one tract or body in a reasonably compact form ; though the fact that such a tract is intersected by a highway, railway, or water-course, will not defeat the claim of the owner to hold it as his homestead. But where one of the tracts claimed as exempt lies more than a mile distant from that tract whereon the

<sup>1</sup> *Adams v. Jenkins*, 16 Gray 146.    <sup>2</sup> 18 Ill. 194 ; confirmed in 21 Ill. 178.

<sup>3</sup> *Thornton v. Boyden*, 31 Ill. 200.

homestead dwelling is, though it may be convenient or necessary for the use of the householder, it will not be held to be a part of the homestead.<sup>1</sup>

§ 139. In Minnesota, a person residing upon one parcel of land, and owning other parcels upon which he has never dwelt, cannot claim such other parcels as exempt, not even though he has them under cultivation, and they abut on his actual homestead.<sup>2</sup>

§ 140. In Iowa, while a tract of land not connected with the dwelling may be held as a homestead, it must to this end appear that "they are habitually and in good faith used as a part of the same homestead." The mere fact that the owner used, worked, and occupied the land is not sufficient.<sup>3</sup>

#### MISCELLANEOUS PROVISIONS.

§ 141. Homestead in United States lands.—A homestead selected out of lands acquired from the United States under the Act of May, 1862, which says: "No lands acquired under the provisions of this Act shall, in any event, become liable to the satisfaction of any debt or debts contracted prior to the issuing of the patent therefor."

Held, that a homestead claim perfected by a patent under the above act, and afterwards conveyed by the patentee to another person, "is exempt from execution and sale for a debt contracted by the patentee prior to the issuing of the patent, and which had been reduced to judgment before the conveyance," on the ground that "under the Federal Constitution Congress is vested with the exclusive power to manage and dispose of the public lands. It may dispose of them in such manner, and on such terms and conditions, and subject to

<sup>1</sup> *Herrick v. Graves*, 16 Wis. 166; *Bunker v. Locke*, 15 Wis. 635; following 18 Ill. 194, and 28 Vt. 672.

<sup>2</sup> *Kresin v. Mau*, 15 Minn. 116; *Cogel v. Mickaw*, 11 Minn. 474; *Kelly v. Baker*, 10 Minn. 154.

<sup>3</sup> *Reynolds v. Hull et al.*, 36 Iowa 394.

such restrictions and limitations, as in its judgment will best promote the public welfare."<sup>1</sup>

**§ 142. Trust property cannot become homestead.**—A homestead cannot be carved out of land held in trust by the cestui que trust, though residing on the land, he being a mere tenant at will of the owner of the fee.<sup>2</sup> So a trustee cannot acquire a homestead in land as against the cestui que trust.<sup>3</sup>

**§ 143. Assets of a partnership not subject to homestead claim.**—No right of homestead can be acquired in property which is part of the assets of a partnership.<sup>4</sup>

**§ 144. The legatee of a specific bequest of real estate under a will,** who has the assent of the executor to the legacy, has not such a title as gives him a right to take a homestead therein, to the exclusion of the creditors of the testator. The assent or dissent of the executor is immaterial. The legatee takes subject to the charge that all the testator's property became assets at his death for the payment of his debts. The lien of a judgment follows the land into the hands of the legatee, as they would into the hands of any purchaser from the testator.<sup>5</sup>

**§ 145. Homestead acts apply to and affect property acquired previous to their passage, as well as that subsequently acquired.**<sup>6</sup>

<sup>1</sup> *Miller v. Little*, 47 Cal. 349; *Clark v. Bayley*, Sup. Ct. Oregon, Dec. Term 1874, Cent. L. Jour. May 1, '75.

<sup>2</sup> *Sumner v. Sawtelle*, 8 Minn. 309.

<sup>3</sup> *Shepherd v. White*, 11 Texas 346.

<sup>4</sup> *Kingsley v. Kingsley*, 39 Cal. 665; *Clegg v. Houston*, 1 Phila. R. 352.

<sup>5</sup> *Morris v. Ross*, 42 Ga. 121.

<sup>6</sup> *Cook v. McChristian*, 4 Cal. 23; *Moss v. Warner*, 10 Cal. 296.

## CHAPTER VI.

## WHO MAY CLAIM THE RIGHT OF HOMESTEAD.

§ 146. The right of selecting a homestead, by the head of the family, exists now in nearly all of the States and Territories of the Union. There is a uniform agreement, that the husband or father, being primarily the head of the family, has, as such, the right of such selection. But according to the decisions of many of the States, one may be such head, however, without being either. Thus, the mother may become such upon the death of the husband. So, a son, having a mother, brother, or sister, or all or either, depending upon him for a support, and living in a household which he controls, might be such head.<sup>1</sup>

§ 147. In the Civil Code of California, Sec. 1261, as amended in 1874, the phrase "head of a family" is defined to be—

- 1st. The husband, when the claimant is a married person.
- 2d. Every person who has residing on the premises, with him or her, and under his or her care and maintenance, either—
  - (1.) His or her minor child, or the minor child of his or her deceased wife or husband ;
  - (2.) A minor brother or sister, or the minor child of a deceased brother or sister ;
  - (3.) A father, mother, grandfather or grandmother ;
  - (4.) The father, mother, grandfather or grandmother of a deceased husband or wife ;
  - (5.) An unmarried sister, or any other of the relatives men-

<sup>1</sup> Whalen v. Cadman, 11 Iowa 226 ; Parsons v. Livingston, 11 Iowa 104.



tioned in this section, who have attained the age of majority, and are unable to take care of or support themselves.

By Section 1260 of the same Code, any person other than the head of a family may select a homestead of the value of one thousand dollars.

In Arkansas, the right extends to all inhabitants, male or female, being a householder or the head of a family.<sup>1</sup>

So in Minnesota, the right extends to every resident of the State, who is the owner and occupant of the land in which the right is claimed. This may be a widow, or minor children, who shall be occupants for the purposes of a home.<sup>2</sup>

In Georgia, the right likewise extends to the head of a family, and in some cases, to his or her children under the age of fifteen.<sup>3</sup>

In Illinois, it attaches to a householder with a family.<sup>4</sup> So in Maine, Massachusetts, Michigan, Mississippi, New York, New Hampshire, Ohio, Vermont, and so of the others.<sup>5</sup>

In Texas, under the Constitutions of 1845, 1866, and 1869, every head of a family could acquire a homestead, and such head of a family comprised a husband, with his wife living, a widower or a widow, with minor children dependent upon him or her, a divorced wife to whom the care of the children had been assigned, a guardian, or any other person to whom, as the head, the members of the family were entitled or obliged to look for maintenance or assistance.

**§ 148. But a husband, whose wife was living away from the State, could not claim the homestead right.** "Though the domicile of the husband, as a general rule, is to be regarded as the domicile of the wife, but this rule cannot be held to admit of no exception. The husband cannot come from a foreign country, acquire a homestead, and remain

<sup>1</sup> *McKenzie v. Murphy*, 24 Ark. 155.

<sup>2</sup> *Folsom v. Carli*, 5 Minn. 337; *Revalk v. Kraemer*, 8 Cal. 66, 71; *Tillotson v. Millard*, 7 Minn. 520; *Gee v. Moore*, 14 Cal. 476, 477; *Bowman v. Norton*, 16 Cal. 217.

<sup>3</sup> *Davenport v. Alston*, 14 Geo. 271.

<sup>4</sup> *Kitchell v. Burgwin*, 21 Ill. 40; *Dære v. Chapman*, 25 Ill. 612.

<sup>5</sup> *Silloway v. Brown*, 12 Allen 30; *Doyle v. Coburn*, 6 Allen 71; *Beecher v. Baldy*, 7 Michigan 488; *Morrison v. McDaniel*, 30 Miss. 217; *Griffin v. Sutherland*, 14 Barbour 458; *Sears v. Hanks*, 14 Ohio St. 298.

years in Texas, (his wife, meanwhile, remaining in that foreign country) and then claim a homestead in his property to the exclusion of the rights of others.”<sup>1</sup>

So, in Alabama, it was held in the case of *Allen v. Manasse*,<sup>2</sup> that a person who has his wife and one or more children permanently residing in another State, cannot claim the exemption. “The exemption is not conferred on the property of every person, and it seems clear that a debtor, merely as such, is not considered; it is only when connected with others that protection is cast around his property, and the reason is, that those dependent on him may not be injured by his destitution. This connection, too, which creates the exemption, must exist in the State. The fact that the claimant had been accompanied by his son during his residence within the State does not constitute them a family, within the sense of the statute. To constitute such a family there must be a condition of dependence, and no mere aggregation of individuals will create this relation. Nor can the circumstance that a family exists elsewhere have any material influence on the case. They are possibly dependent upon the plaintiff, but they are not a family within this State, and therefore are not within the letter or spirit of the act.”

Under the Act of 1833, in Alabama, to entitle a debtor to its benefit, which exempts certain property from execution, it was necessary that he had a family within the State.<sup>3</sup>

Where a debtor owned a farm, one portion of which was in Alabama, and another portion in Mississippi, the house in which he resided being on the Mississippi side of the line; the levy was made in Alabama, and the question was, therefore, whether the plaintiff was entitled to the protection of the Act of 1833, which exempts one horse, etc., from levy and sale for the use of every family.

The Court applied the rule of construction laid down in *Allen v. Manasse*, above cited, and held that as the debtor did not have his residence within the State, but resided beyond the limits of it, he was not within its protection. The Court was

<sup>1</sup> *Meyers v. Claus*, 15 Texas 516.

<sup>2</sup> 4 Ala. 554.

<sup>3</sup> *Ambercrombie v. Anderson*, 9 Ala. 981.

also of opinion that the statute of Mississippi, which is almost identical with that of Alabama, could not protect him. For although the horse was exempt from levy and sale in Mississippi, yet the act of that State, being local, cannot protect property beyond her jurisdiction. So the debtor between the two statutes lost his horse.<sup>1</sup>

But under the Alabama Constitution of 1867 (Art. 14, Sec. 1) a resident without a family may claim the benefit of the exemption laws.<sup>2</sup>

**§ 149. In Nebraska, in regard to a resident alien whose family is not in the State,** it is held that such alien is as much entitled to the benefit of the law giving exemption from sale of his property taken upon execution against him, as a citizen ; if such alien came to the State with a settled purpose of abandoning his foreign residence, and on his arrival fixed upon the State as his home, with the intention of bringing his family to join him. The statutes of Nebraska, on this subject, make no distinction between resident and alien citizens ; they are alike entitled to their protection and benefits. In this they are in harmony with Sec. 14, Art. 1, of the constitution of the State, which declares that “no distinction shall ever be made by law between resident aliens and citizens, in reference to the possession, enjoyment, or descent of property.”<sup>3</sup>

**§ 150. Temporary residence of husband and wife sufficient.**—In California, it has been held in the case of *Dawley and Wife v. Ayers*,<sup>4</sup> that, during a temporary sojourn of husband and wife, who do not intend to reside permanently within the State, they are entitled to the right of homestead so long as they claim and use the property as such. The Court said : “It appears from the record that the plaintiffs own a tract of land in Missouri, incumbered by a mortgage, and that it had been their intention, after making some money here—suffi-

<sup>1</sup> *Boykin v. Edwards*, 21 Ala. 261.

<sup>2</sup> *Webb v. Edwards*, 46 Ala. 17.

<sup>3</sup> *The People ex rel Dobson v. McClay*, 2 Neb. 7.

<sup>4</sup> 23 Cal. 110.

cient at least to pay off the mortgage—to return to that State to reside. (It being contended that they were not citizens, or bona fide residents, therefore they were not entitled to the benefits of the homestead law.) “The homestead law is not limited in its operations to any class, but is universal in its application ; and all classes of persons are entitled to its benefits, without any distinction as to citizenship, or capability of becoming citizens. So long as the parties actually reside in the State and use the property as a home, they cannot be denied the benefits secured by law.”

**§ 151. Death of wife and departure of adult children does not destroy right.**—In Massachusetts, a householder does not lose the right of homestead by death of his wife and departure of the children who have arrived at maturity, or by reason of divorce. The reason assigned for the continuance of the right is, that he may adopt other persons as members of his family.<sup>1</sup>

**§ 152. When a widower in Iowa, without children, acquired real property, which he occupied as a homestead for himself and his mother, who was the sole member of his family, it was held that he was the head of a family within the meaning of the statute, and that the premises so occupied were exempt from levy and sale.**<sup>2</sup> So a widower without children may retain a homestead right in property which the wife, holding the legal title, had (under the statute) devised to another.<sup>3</sup>

In Wisconsin, the privilege of the homestead exemption is not confined to married men. In the case of *Meyers v. Ford*,<sup>4</sup> the plaintiff, a widower, whose children were all married and away from home, had rented the premises claimed as his homestead, but boarded and lodged in the house ; it was held that the premises were exempt.

<sup>1</sup> *Silloway v. Brown*, 12 Allen 34 ; *Doyle v. Coburn*, 6 Allen 71 ; see, per contra, *Revalk v. Kraemer*, 8 Cal. 72 ; see, in support of Mass. cases, 11 Iowa 226 and 105 ; *Barry v. Leeds*, 51 N. H. 253 ; *Meyers v. Ford*, 22 Wis. 139.

<sup>2</sup> *Whalen v. Cadmus*, 11 Iowa 226 ; *Parsons v. Livingston*, Id. 104.

<sup>3</sup> *Stewart v Brand*, 23 Iowa 477.

<sup>4</sup> 22 Wis. 139.

The same rule is adopted in New Hampshire. A widower having a minor child residing with him, and supported by him, at his own dwelling-place, is the head of a family. And as such head of a family he is secured by law in the possession and enjoyment of, and title to the homestead right, exempt from sale on execution. The right thus acquired is not lost or destroyed by the arrival of his only child at maturity and its removal from the homestead, the father still continuing to occupy the premises as his dwelling-place and home.<sup>1</sup>

**§ 153. Unmarried women as heads of families.**—A woman who was never married, and had no children, cannot hold an estate of homestead in Massachusetts, although she lives on the property with her mother, under Stat. 1855, C. 238, which enacted that “there shall be exempted to the value of \$800, the homestead farm, or lot or building thereon, occupied as a residence and owned by the debtor, he being a householder and having a family,” held that “looking at the provisions of this statute, it would seem quite clear that they do not embrace the case of an unmarried woman having no children.”<sup>2</sup> It seems difficult to reconcile the doctrine as laid down in the above case, and that in 12 Allen 34, and 6 Allen 71, *Meyers v. Ford*, 22 Wis. 139, and the other cases quoted supra, Secs. 151, 152; wherein a son living with his mother is held competent to receive the protection of the exemption laws, who certainly does not require to be shielded by force of law from creditors any more than does the daughter.

**§ 154. An unmarried woman who has the care of her child, a minor,** is permitted to select a homestead not exceeding the statutory value, though she has never been married, and the child be a bastard.<sup>3</sup>

**§ 155. A wife having no children of her own,** is not, in Georgia, the head of a family of the children of her husband by a former marriage, therefore she is not entitled to the protection of the exemption laws.<sup>4</sup>

<sup>1</sup> *Barney v. Leeds*, 51 N. H. 253.

<sup>2</sup> *Woodworth v. Comstock*, 10 Allen 425.

<sup>3</sup> *Ellis v. White*, 47 Cal. 75.

<sup>4</sup> *Lathrop v. Soldins*, 45 Ga. 483.

**§ 156. A married woman possessed of separate property, residing in Alabama, who has no children and whose husband is non-resident, has no family within the contemplation of the statute, and is not entitled to claim the benefit of the exemption law.<sup>1</sup>**

**§ 157. Residence of the wife alone, her husband never having resided on the premises, a proper declaration having been filed by her, was held in California to have been sufficient. The Court said:<sup>2</sup> "The point is not free from difficulty. It is clear that under the act there cannot be two separate valid homestead claims,<sup>3</sup> the one by the husband, and the other by the wife, upon separate parcels of land ; but in the absence of any showing as to the causes of the absence of the husband from the homestead selected by the wife, or any proof that he had a fixed home or residence elsewhere, or any other family than his wife, it appears to be entirely consistent with the spirit of the homestead act, that the wife having a family of her own" (in this instance the family consisted of a sister and niece whom she had raised) "should be allowed to select and establish a homestead, by her own residence upon it with her family."<sup>4</sup>**

**§ 158. If the husband abandons the wife she becomes then the head of the family, and may control the homestead, and exercise power over it as fully as though she were a *feme sole*.<sup>5</sup>**

Abandonment and adultery on the part of the wife will not divest the homestead of its character as such, nor will it defeat or impair her right to it as a homestead, nor that of the children.<sup>6</sup>

**§ 159. The surviving widow is, as to the homestead, as**

<sup>1</sup> Keiffen v. Berney, 31 Ala. 192.

<sup>2</sup> Gambette v. Brock, 41 Cal. 83.

<sup>3</sup> See Sec. 324 as to two homesteads of wife, and family, of two marriages.

<sup>4</sup> See Tourville v. Pierson, 39 Ill. 446.

<sup>5</sup> Wright v. Hayes, 10 Texas 130.

<sup>6</sup> Lies v. De Diablar, 12 Cal. 329.

much the head of the family, and entitled to control the rents and profits of the same, as was the husband when living.<sup>1</sup>

**§ 160. A bachelor may be head of family.**—A bachelor who has living with him a mother and two sisters, all over twenty-one years of age, in the same house, on land which he seeks to set apart as a homestead for his and their use, is a head of a family. “A husband, a widow, a guardian, or a trustee, who represents those who are dependent upon him or her for a support, and is the head of a family of such dependents, is entitled to a homestead; and there is no reason why the same rule does not apply in favor of the head of any other household of dependents whom it is his legal duty” (under the particular statute alluded to) to support, while the relation lasts and the necessity exists.<sup>2</sup>

**§ 161. But where the bachelor has no person depending upon him for support and maintenance,** which the law would impose upon him as a legal duty, such bachelor is not the head of a family in such a sense as to make him entitled to a homestead. And the Georgia statutes of 1870, “declaring a single person to be the head of a family, is unconstitutional.” It assumes to be an act “declaratory of the meaning of the constitution, whereas under our system of government, the judiciary is alone empowered to interpret the constitution and the laws.”<sup>3</sup>

So, an unmarried man, with whom his brother and his brother's wife lived, and for whom they kept house, he furnishing the necessaries for house-keeping and living, was held not to be the head of a family within the contemplation of the homestead laws.<sup>4</sup>

In Texas, where a single man who had sometimes occupied a house and lot as a sleeping place, never having servants or any person connected with him residing on it, and who had rented out the place when the execution was levied, it was held, that he had no family claims, and the property was subject to forced sale.<sup>5</sup>

<sup>1</sup> *Floyd v. Mosier*, 1 Iowa 513.

<sup>3</sup> *Calhoun v. McLendon*, 42 Ga. 405.

<sup>2</sup> *Marsh v. Lazenby*, 41 Ga. 153.

<sup>4</sup> *Whalen v. Cadmus*, 11 Iowa 226.

<sup>5</sup> *Wilson v. Cochran*, 31 Texas 677.

In Indiana, where a man was shown to be over twenty-one years of age, and unmarried ; he and his sister lived together for several years, each owning some personal property, and each by their labor contributing towards their household expenses, he appearing to direct and control affairs ; under these circumstances, the Court was of opinion that he was a householder, and entitled to the benefits of the exemption law.<sup>1</sup>

**§ 162. Under the constitution and statutes of Arkansas, the right of homestead is not confined to married men, or heads of families.<sup>2</sup>**

**§ 163. Members of a copartnership are not entitled to the exemption of copartnership property under the laws of Pennsylvania.<sup>3</sup>**

**§ 164. In Connecticut a wife may acquire a homestead, "as her separate property." The statutes of that State provide that whenever the husband's interest in the homestead or dwelling-house has been levied upon, the wife may tender the amount of the execution, and thereupon be conveyed to the wife, and thereafter vested in her.<sup>4</sup>**

<sup>1</sup> *Graham v. Crockett*, 18 Ind. 119; *Marsh et als. v. Lazenby*, 41 Ga. 153.

<sup>2</sup> *Greenwood v. Maddox*, 27 Ark. 648.

<sup>3</sup> *Clegg v. Houston*, 1 Phila. R. 352.

<sup>4</sup> Stat. of Conn. Chap. 73. Properly speaking, there is no provision for homestead, in the general acceptance of the term, in Connecticut.



## CHAPTER VII.

## HOW IT MAY BE ACQUIR

**§ 165. General rule—Actual residence necessary.**—While the mode and manner of: of homestead varies in the several States, be very general, which is, that to impress the legal attributes of a homestead—beside: must be actual residence and occupation by the family.<sup>1</sup>

**§ 166. Certain steps must be taken.**—In many of the States the right of homestead attaches, by occupancy, without any formal act of the proprietor of the home—the statutes confer the right as an incident to the estate. But in a number of the States, the claimant is required, by enactment, to take certain steps, such as declaration and recording, in order to be entitled to the benefits of the exemption. When such is the statutory requirement it must be pursued before levy, or sale, or conveyance by the husband alone, or the right may be lost. The right of the homestead exemption being the

<sup>1</sup> *Moss v. Warner*, 10 Cal. 296; *Cook v. McChristian*, 4 Cal. 26; *Christy v. Dyer*, 14 Iowa 438; *Charless v. Lamberson*, 1 Iowa 435; *People v. Plumsted*, 2 Mich. 465; *Tillotson v. Millard*, 7 Minn. 513; *Coolidge v. Wells*, 20 Mich. 79; *Morgan v. Stearnes*, 41 Vt. 398; *Hoitt v. Webb*, 36 N. H. 158; *Horn v. Tuft*, 39 N. H. 484; *Allman v. Gann*, 29 Ala. 240; *Brown v. Martin*, 4 Bush (Ky.) 47; *Earle v. Earle*, 9 Texas 630; *Philleo v. Smally*, 23 Texas 498; *Prior v. Stone*, 19 Texas 371; *Franklin v. Coffee*, 18 Texas 413; *Austin v. Swank*, 9 Ind. 112; *Robeson v. Lindrum*, 47 Ga. 250; *Morrison v. McDaniel*, 30 Miss. 213, 287; *Koster v. McWilliams*, 41 Ala. 302; *Prescott v. Prescott*, 45 Cal. 58; *Rix v. McHenry*, 7 Cal. 91, Id. 245; *Elmore v. Elmore*, 10 Cal. 226; *Wisner v. Farnham*, 2 Mich. 472; *Dyson v. Shelay*, 11 Mich. 527; *Tourville v. Pearson*, 39 Ill. 447; *Lee v. Miller*, 11 Allen (Mass.) 37; *Elston v. Robinson*, 23 Iowa 208, 14 Id. 438, 527, 523; *Kresin v. Mau*, 15 Minn. 116; *Brown v. Martin*, 4 Bush (Ky.) 47; *True v. Morrill*, 28 Vt. 672; *Norris v. Moulton*, 34 N. H. 392; *Lawton v. Bruce*, 39 Me. 484.

creature of constitutional provision, or statutory enactment of the particular State, the person claiming its protection must pursue the requirements of the law under which the exemption is claimed.<sup>1</sup>

**§ 167. States in which formal act of selection is necessary.**—Besides occupancy and ownership, or some right or title to the land, in order to be protected in the right, it is necessary to make selection and record of the homestead in the States and Territories of Alabama, California, Colorado, Georgia, Idaho, Indiana, Kentucky, Maine, Massachusetts, Michigan, Nevada, New Jersey, New York, Virginia, Washington Territory, and Western Virginia.

**§ 168. States and Territories in which no formal act of selection is necessary.**—No formal act of selection is necessary, beyond right to the land, and occupancy by the family, in the States and Territories of Arizona, Arkansas, Connecticut, Dakota, Florida, Illinois, Iowa, Kansas, Louisiana, Maryland, Minnesota, Montana, Mississippi, Missouri, Nebraska, New Hampshire, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Vermont, Wyoming, and Wisconsin.

**§ 169. The modes of acquiring homesteads in the various States and Territories, are as follows :—**IN ALABAMA, the exemption is dependent on the fact that the family has the home in actual use, and selected by the head of the family.<sup>2</sup>

IN ARIZONA, any owner may select from his or her property a quantity of land, with the dwelling-house thereon, not exceeding the statutory value, as a homestead. No formality

<sup>1</sup> *Dyson v. Shely*, 11 Mich. 527 ; *Slanker v. Beardsly*, 9 Ohio St. 589 ; *People v. Plumsted*, 2 Mich. 465, 469 ; *Front v. Shaw*, 3 Ohio St. 270 ; *Manning v. Done*, 10 Rich. (S. C. Law) 395 ; *Pinkerton v. Tumlin*, 22 Ga. 165 ; *Davenport v. Alston*, 14 Ga. 271 ; *Herschfeldt v. George*, 6 Mich. 456 ; *Beecher v. Baldy*, 7 Mich. 510 ; *Crow v. Whitworth*, 20 Ga. 38, 2 Grant's Cases 197 ; *Lawton v. Bruce*, 39 Me. 484 ; *Clark v. Pattee*, 15 Gray 21 ; *Helpenstein v. Gore*, 3 Iowa 292 ; *Brown v. Martin*, 4 Bush (Ky.) 47.

<sup>2</sup> *Koster v. McWilliams*, 41 Ala. 302 ; affirming principles announced in *Allman v. Gann*, 29 Ala. 240.

is necessary in order to secure the exemption. The householder may notify the officer at the time of the levy of what he claims as homestead.<sup>1</sup>

IN ARKANSAS, the constitutional requirements are residence, ownership, and actual occupation.<sup>2</sup>

IN CALIFORNIA, premises do not assume the homestead character until there has been actual residence thereon by the family. It must be resided upon and used as such at the time that the declaration of homestead is made.<sup>3</sup> The declaration may be made by "the husband and wife, or either of them, or other head of family, and acknowledged as a grant of real property, and recorded in the office of the recorder of the county in which the land is situated; which statement must show that the person making it is residing on the land, and claims it as a homestead."<sup>4</sup>

IN COLORADO, the claimant is required, in order to be entitled to the benefit of the act, to have written in the margin of the record of his recorded title, the word "Homestead," and it shall only be exempt while occupied as such by the owner or his family.<sup>5</sup>

IN CONNECTICUT, strictly speaking, there is no law of homestead other than the provision, "that whenever a husband and wife shall have a joint or separate title to the whole or any part of the homestead, or dwelling-house, and lot, on which the same is situated, and any creditor of the husband shall have levied an execution upon the husband's interest therein, the wife may tender to the creditor the amount of his execution, and the interest so levied upon shall be conveyed to the wife, and thereafter vested in her," and shall not be liable for debts of the husband.<sup>6</sup>

IN DAKOTA, the law provides that the homestead may be acquired by marking off by fixed visible monuments embrac-

<sup>1</sup> Comp. L. of Arizona, Chap. 37, Sec. 1.

<sup>2</sup> Gould's Digest 68, Sec. 29, Ark. Code 481; *Greenwood v. Maddox*, 27 Ark. 649.

<sup>3</sup> *Gregg v. Bostwick*, 33 Cal. 227; *Benedict v. Bunnell*, 7 Cal. 245; *Holden v. Pinney*, 6 Cal. 234. Under the Act of 1851, up to the amendatory Act of 1860, no record notice was required.

<sup>4</sup> Cal. Code, Secs. 1262, 1263, and 1264.

<sup>5</sup> Laws Colorado T., Jan. 10, 1868.

<sup>6</sup> Stat. of Conn. 1869, Chap. 73. See Rev. Stat. of Conn. 1866, p. 302.

ing the dwelling. The description of the homestead, certified and acknowledged by the owner, shall be recorded by the register of deeds of the proper county, in a book to be called the "Homestead Book," shall be exempt so long as it retains the character of homestead, but a failure to record it as such homestead does not render it liable to execution. It may be claimed and selected when execution is levied upon the premises, and becomes the duty of the officer to set apart the dwelling-house and lot of the statutory value.<sup>1</sup>

IN FLORIDA, a homestead, to the extent of 160 acres of land in the country, or half an acre within the limits of any incorporated city or town, owned by the head of a family residing in the State, and the improvements on such real estate, may be acquired by occupancy, if in a rural district, must be cultivated or put to other productive use to the extent of, at least, five acres.<sup>2</sup>

IN GEORGIA, the requirements of the law—Act of 1868—are that every person seeking the benefit of the homestead exemption, provided for in the act, shall make out a schedule and description to be approved by the ordinary, and when so approved to be recorded in the clerk's office of the Superior Court.<sup>3</sup>

IN IDAHO, the claim must be made in writing, the premises particularly described, and the declaration executed in the same manner as a conveyance of real estate, and recorded.<sup>4</sup>

IN ILLINOIS, the right of homestead will not arise from purchasing property for a homestead, but from actual occupancy as such, and this occupation must be by the husband and family.<sup>5</sup> The statute does not require the husband or wife to do anything further in order to create the exemption; the law confers that right.<sup>6</sup>

<sup>1</sup> Laws of Dakota, 11 Sess. January 14th, 1875, p. 164.

<sup>2</sup> Const. of Fla. 1868, Art. 10, Secs. 1, 2, 3. Bush's Digest, 325, Laws 1866, 1869, 1871, and 1872.

<sup>3</sup> Const. of Ga. 1868, Code 2013; *Dearing v. Thomas*, 25 Geo. 224; *Pinokerton v. Turlin*, 22 Ga. 165; *Robson v. Lindrum*, 47 Geo. 250; *Davenport v. Alston*, 14 Ga. 271.

<sup>4</sup> Laws of Idaho, Feb. 2d, 1864.

<sup>5</sup> *Tourville v. Pierson*, 39 Ill. 447.

<sup>6</sup> *Pardee v. Lindley*, 31 Ill. 187.

IN INDIANA, selection must be made by the head of the family of the property which is proposed to be held exempt.<sup>1</sup>

IN IOWA, the homestead claimant may make his selection, and have it recorded in the registry of deeds. This may be done by either of the spouses. If no selection is made, an officer having an execution must cause it to be done before levy. There must be actual occupancy.<sup>2</sup>

IN KANSAS, the homestead may be selected by any head of family, out of lands occupied as such ; if not so selected by such head of family before levy, it may then be claimed by the husband, wife, agent, or attorney, or other head of family.<sup>3</sup>

IN KENTUCKY, there must be actual use, purpose, and intention of the claimant, to use and enjoy the property sought to be exempted as a home, by himself and family.<sup>4</sup>

IN LOUISIANA, the prerequisites of the right of acquisition are ownership, actual residence, family ties, or persons dependent on claimant for support.<sup>5</sup>

IN MAINE, the claimant must file a certificate of selection in the proper record office, containing a description of the premises, and the family must be in the actual possession ; provided, however, that the claimant is not the owner of an exempted lot purchased from the State.<sup>6</sup>

IN MARYLAND, actual bona fide residence and occupation of the claimant are the only essentials to the acquisition. No other formalities are necessary till the issuance of an execution against the property.<sup>7</sup>

IN MASSACHUSETTS, there must be selection, recording, and actual residence at the time the declaration is made.<sup>8</sup>

IN MICHIGAN, the claimant must be the owner and occupant of the land, and a formal act of selection made before levy and sale.<sup>9</sup>

<sup>1</sup> *Austin v. Swank*, 9 Ind. 112 ; *Haven v. Melogue*, 9 Ind. 196.

<sup>2</sup> *Charless v. Lamberson*, 1 Iowa 435 ; *Elston v. Robinson*, 23 Iowa 208.

<sup>3</sup> *General Laws of Kansas*, 1868, 473 ; *Const. Kansas*, Art. 15.

<sup>4</sup> *Myers' Supplement*, 714 ; *Brown v. Martin*, 4 Bush (Ky.) 47.

<sup>5</sup> *Stat. of La.* 333, Sec. 1691 et seq. ; *Rev. Stat.* 1870, Arts. 644, 645.

<sup>6</sup> *Lawton v. Bruce*, 39 Maine 484.

<sup>7</sup> *Code Sup.* 1861-7 and 1870, Sec. 6.

<sup>8</sup> *Gen. Stat. C.* 104, Sec. 2 etc. ; *Lee v. Miller*, 11 Allen 37.

<sup>9</sup> *Stat.* 1848, *Const.* 1850, *Stat.* 1861 ; *Wisner v. Farnham*, 2 Mich. 472 ; *People v. Plumstead*, 2 Mich. 465 ; *Dye v. Mann*, 10 Mich. 298.

IN MINNESOTA, no other requirements are prescribed than that of residence and occupation, in order to acquire the right of homestead.<sup>1</sup>

IN MONTANA, the law provides for selection and recording, but failure to select and record does not make the homestead liable. It must be owned and occupied.<sup>2</sup>

IN MISSISSIPPI, the only requirements are that the premises be of the prescribed value and size—in the country, 240 acres—and occupied as a residence in order to secure exemption from forced sale.<sup>3</sup>

IN MISSOURI, no formality is required beyond ownership and occupation by the family of any resident of the State, not to exceed 160 acres in the country, and the prescribed value, including improvements. In towns having a population of 40,000 and upwards, not to exceed eighteen square rods of a certain value, and in towns of less than 40,000, thirty square rods, not to exceed the statutory value.<sup>4</sup>

IN NEBRASKA, if no selection is made by the householder, or head of family before levy, selection can then be made of the prescribed quantity with the improvements.<sup>5</sup>

IN NEVADA, in order to secure the right of homestead, the husband and wife, or either of them, or other head of family, must sign, acknowledge, and record a declaration that they are actually residing on the premises, particularly describing the same, and intend to hold and claim the same as such homestead.<sup>6</sup>

IN NEW HAMPSHIRE, no formal act of setting apart the homestead is necessary; the right attaches by occupancy and ownership, not exceeding the amount exempt by law.<sup>7</sup>

IN NEW JERSEY, it is necessary that the claimant should own and occupy the premises with his family. There must

<sup>1</sup> *Tillotson v. Millard*, 7 Minn. 517; *Kresin v. Mau*, 15 Minn. 116; *Cogel v. Mickow*, 11 Minn. 475.

<sup>2</sup> Stat. 1871-2, 84.

<sup>3</sup> Laws of 1865; *Morrison v. McDaniel*, 30 Miss. 213.

<sup>4</sup> Stat. of Missouri, 1870 p. 859.

<sup>5</sup> Laws of Nebraska, 1873 p. 616.

<sup>6</sup> Compiled Laws of Nevada, p. 60.

<sup>7</sup> *Norris v. Moulton*, 34 N. H. 392; *Hoit v. Webb*, 36 N. H. 158; *Horn v. Tuft*, 39 N. H. 484.

be selection or declaration of the claim of homestead by the claimant of record ; either the conveyance by which the title to such land is acquired must show such intention, or a notice of such claim to so hold must be executed and acknowledged by the person owning the property, containing a full description, recorded in the office of the clerk of the county in which the property is situated.<sup>1</sup>

IN NEW YORK, the homestead statute is similar to that of Massachusetts ; either the deed of the owner must disclose the intention to claim the premises as a homestead, or he is required to make a declaration by an instrument in writing, executed and acknowledged, describing the premises occupied as a residence, and filed and recorded in the clerk's office of the proper county.<sup>2</sup>

IN NORTH CAROLINA, every resident may claim a homestead, provided the claimant occupies the same "as an actual" homestead. The exemptioner is not obliged to take any steps in order to secure the protection of the law before levy, and then, if not claimed, the officer having an execution against the debtor is commanded to appoint appraisers to set off the same ; the law also provides that the claimant may apply to the justice of the peace, before levy, to set off the same.<sup>3</sup>

IN OHIO, no formal act is necessary ; the selection may be made at any time, by either husband or wife, or other head of family, before sale under execution.<sup>4</sup>

IN PENNSYLVANIA, the debtor exercises the right to claim the homestead when levy is made, to the officer having the execution, and if there is neglect to claim it, then he is held to have waived the right.<sup>5</sup>

IN SOUTH CAROLINA, application may be made to the officer having an execution against the property to have the exemption set off.<sup>6</sup>

<sup>1</sup> Nixon's Digest Laws N. J., 1868, p. 859.

<sup>2</sup> Rev. Stat. of N. Y. ; 4 Edmonds' Stats. 633 (Act of 1850).

<sup>3</sup> Laws of N. C. 1868 and '69, 331, Const. Art. 10, Sec. 2.

<sup>4</sup> Rev. Stat. of Ohio 1145, Act of March 23, 1850.

<sup>5</sup> Bowman v. Smiley, 31 Penn. 225 ; Miller's Appeal, 16 Penn. St. 300 ; Dobson's Appeal, 25 Penn. 234.

<sup>6</sup> Manning v. Dove, 10 Rich. 403 ; Const. 1868, Art. 2, Sec. 32.

IN TENNESSEE, no steps need be taken by the head of the family, in order to secure the exemption. When an execution against the property of a debtor is placed in the hands of an officer, it becomes his duty first to select three disinterested freeholders, who shall set apart the premises occupied, of the prescribed value.<sup>1</sup>

IN TEXAS, occupation of premises by any head of family is a sufficient dedication of the premises to homestead purposes, if within the prescribed value, when appropriated to such use.<sup>2</sup>

IN UTAH, no formality is necessary in acquiring the homestead—it is sufficient that it be occupied by the claimant and his family.<sup>3</sup>

IN VIRGINIA, either the deed through which the land is claimed must specify that it is intended to claim such premises as a homestead, or a declaration filed for record. But the failure to so select the homestead does not prevent the claimant from invoking the protection of the law against an attempted levy and sale.<sup>4</sup>

IN VERMONT, the essential condition of the acquisition of a homestead is ownership, or right and occupancy by the family.<sup>5</sup>

IN WASHINGTON TERRITORY, in order to acquire the right, the word “Homestead” must be inscribed on the margin of the claimant’s recorded title.<sup>6</sup>

IN WESTERN VIRGINIA, there must be dedication and written record of the homestead by the head of family residing within the State.<sup>7</sup>

IN WISCONSIN, ownership and occupation by the family are the only essential requirements of the right of exemption of the homestead.<sup>8</sup> The exception extends also “to any person

<sup>1</sup> Shankland’s Stats. 117.

<sup>2</sup> Paschal’s Laws of Texas, 1870.

<sup>3</sup> Laws of Utah, 1870, 58.

<sup>4</sup> Acts of Vir. 1866 and 7, p. 926, and Acts 1869 and ’70, 198, Acts 1871 and ’72, p. 22.

<sup>5</sup> Morgan v. Stearns, 41 Vt. 398; True v. Morrill, 28 Vt. 672.

<sup>6</sup> Gen. Laws Wash. Ter. 1869, Id. ’71, Chap. 31, Sec. 333.

<sup>7</sup> Stats. 1872–3, 554–9.

<sup>8</sup> Rev. Stat. Wis. 1858, Sec. 23, Chap. 134.



owning and occupying any dwelling-house on land not his own, which land he shall be rightfully in possession of by lease or otherwise.<sup>1</sup>

IN WYOMING, the homestead is exempt so long as it is actually occupied by the family. No selection is required.<sup>2</sup>

IN the States of DELAWARE, OREGON, and RHODE ISLAND there is no homestead exemption, nor in the Territory of NEW MEXICO.

**§ 170. Residence necessary when notice filed.**—The homestead for which the law provides is not one in name merely, but one in fact ;<sup>3</sup> therefore it is necessary, as a general rule, (to which there are a few exceptions) that when record notice is required to be filed, the person filing the declaration should actually reside upon the premises at the time of filing such notice.<sup>4</sup> Making and recording a declaration of homestead, and beginning to build a house on the land described in the declaration, will not entitle one to an estate of homestead therein until an actual living upon the premises. Even the fact that a house which had been on the land, previously, and which had been occupied for a short time, for temporary purposes, harvesting a crop, would not be within the requirements of the law.<sup>5</sup> A mere intention to occupy, though subsequently carried out, is not sufficient.<sup>6</sup>

**§ 171. Intention to use land bought as a homestead at some future time, but which has no dwelling upon it, and has never been used as a homestead, is not sufficient, and does not exempt the land from levy and sale.**<sup>7</sup> Thus, in Kentucky,

<sup>1</sup> Laws of Wis. 1858, Sec. 28, Chap. 134. Amended 1867, Chap. 172.

<sup>2</sup> Laws of Wyoming, 1869, 305.

<sup>3</sup> Gregg v. Bostwick, 33 Cal. 227 ; Benedict v. Bunnell, 7 Cal. 245 ; Holden v. Pinney, 6 Cal. 234.

<sup>4</sup> Prescott v. Prescott, 45 Cal. 58 ; Gregg v. Bostwick, 33 Cal. 220.

<sup>5</sup> Coolidge v. Wells, 20 Mich. 79 ; Lee v. Miller, 11 Allen 37 ; Lawton v. Bruce, 39 Me. 484.

<sup>6</sup> Christy v. Dyer, 14 Iowa 438 ; Elston v. Robinson, 23 Iowa 208 ; Cole v. Gill, 14 Iowa 527 ; Williams v. Sweetland, 10 Iowa 51 ; Charless v. Lamberson, 1 Iowa 435 ; Tourville v. Pearson, 39 Ill. 447.

<sup>7</sup> Coolidge v. Wells, 20 Mich. 79 ; Christy v. Dyer, 14 Iowa 438 ; Williams v. Sweetland, 10 Iowa 51 ; Cole v. Gill, 14 Iowa 527 ; Charless v. Lamberson, 1 Iowa 435 ; Davis v. Kelly, 14 Iowa 523 ; Tourville v. Pierson, 39 Ill. 447.

when the claimant "neither had his home upon the premises, nor at the time of the levy and sale had treated the property as his place of residence, or by any consistent act, or otherwise, manifested any intention to actually use the property as a home for himself and family," it was held that no right of exemption existed; that the right of exemption of a homestead "depends upon the present and actual purpose and intention of the claimant to use and enjoy the property sought to be exempted as a home for himself and family, and that right does not exist when the residence of the claimant and family is permanently located elsewhere."<sup>1</sup>

In Michigan, under the statutes of 1848, and the constitution of 1850, and the amendatory act of 1861, it has been repeatedly held that a party cannot legally claim the homestead exemption, unless he occupies the premises when the formal act of selection is made, and this must be done before levy and sale; it cannot be done subsequently, such being the condition upon which the law protects a debtor in the enjoyment of his homestead.<sup>2</sup> But it was held in the case of *Thomas v. Dodge*,<sup>3</sup> that it did not require any action on the part of the homestead owner to render a village house and lot, worth less than the statutory value, exempt from execution, so far agreeing with the rule in *Beecher v. Baldy*,<sup>4</sup> in the constitutional protection thrown around the home.

**§ 172. Cannot be acquired by filing notice after removal.**—Thus in California, where, at one time, the husband and wife actually resided on the premises claimed as a homestead, subsequently they removed therefrom, at the husband's request, she going to reside with her brother; in the meantime the premises were rented out, and subsequently conveyed by the husband in fee, but no consideration passed, the grantee in the deed received the same, for the purpose of disposing of the property and giving the proceeds of the sale to the husband; subsequent to the making of the deed, and

<sup>1</sup> *Brown v. Martin*, 4 Bush (Ky.) 47.

<sup>2</sup> *People v. Plumstead*, 2 Mich. 465; *Wisner v. Farnham*, 2 Mich. 472; *Franklin v. Coffee*, 18 Texas 413.

<sup>3</sup> 8 Mich. 51.

<sup>4</sup> 7 Mich. 488.

before sale, the wife made and filed a declaration of homestead on the premises. Held, "that in order to impress the character of a homestead upon premises, they must be such in fact, by occupation at the time the declaration is filed. Under the circumstances appearing, the declaration of the wife, claiming the premises in controversy as a homestead," could not be supported.<sup>1</sup> This use must be actual, not constructive—that is, actual occupancy when the selection is made—occupation by a tenant will not do. But when actual dedication and selection has been made, according to law, a subsequent removal does not, in all cases, destroy the estate created.<sup>2</sup>

**§ 173. The length of time of occupancy required to establish a homestead right in premises may be very short.** In Illinois, where the head of a family purchased a tract of land and went into possession, moving with his family into a house on the premises, (then occupied by his grantor) occupying part of the house and a shanty which he had built; in less than a month his wife was forced to leave him on account of his cruelty; it was held that he had acquired a homestead right in the premises; and that the fact that after his wife had left him he removed from the premises and lived at a neighbor's, was not sufficient to destroy the right thus acquired.<sup>3</sup>

**§ 174. Time—Act of moving in—Presence of family not necessary.**—While it is true that the intention to occupy premises as a homestead is not sufficient to invest it with that character, under some circumstances the homestead character may attach without actual occupancy by the family. Thus, it was held that the homestead character attached to premises which have been purchased for that purpose, and

<sup>1</sup> Prescott v. Prescott, 45 Cal. 58; Gregg v. Bostwick, 33 Cal. 220.

<sup>2</sup> Holden v. Pinney, 6 Cal. 235; Benedict v. Bunnell, 7 Cal. 245; Cary v. Tice, 6 Cal. 625; Wisner v. Farnham, 2 Mich. 472; Philleo v. Smalley, 23 Texas 498; Morris v. Moulton, 39 N. H. 392; Myers v. Claus, 15 Texas 516; True v. Morrill, 28 Vt. 672; Williams v. Sweetland, 10 Iowa 435; Tourville v. Pierson, 39 Ill. 447; Franklin v. Coffee, 18 Texas 413.

<sup>3</sup> Bonnell v. Smith, 53 Ill. 375; Melton v. Andrews, 45 Ala. 454.

not being quite ready for occupancy, the debtor placed his goods in the house, and took board with his family at a hotel in the vicinity till some repairs were completed. It was further held that the homestead character attached to the premises from the time of placing the effects in the house, and that such homestead was exempt from liability for a debt contracted intermediate the moving of the goods into the house, and the actual occupation, or the presence of the family therein.<sup>1</sup>

In New Hampshire, while a debtor was in the act of moving into a dwelling-house with a design to occupy it as the family homestead, and having no other real estate, the plaintiff, his creditor, attached it upon mesne process, and the debtor completed the moving in on the next day, and thereafter occupied it as a family home. The plaintiff subsequently obtained judgment in the suit, and extended his execution upon the whole property ; although application was made to the officer, as required by statute, he refused to set off a homestead. It was held that the property must be regarded as the family homestead at the time of the attachment, and even though it exceeded in value the amount exempted by law ; that therefore the writ was wholly void as against the defendant debtor.<sup>2</sup>

**§ 175. Temporary occupation, with full intent to make permanent home, sufficient.**—In Texas, while there must be a home, or residence, whether house, or cabin, or tent, to constitute a homestead within the protection of the law, it would appear that preparation to improve with the view to occupation will suffice. But that preparation must be of such a character, and to such an extent, as to manifest beyond a doubt the intention to complete the improvements, and reside upon the place as a home. In such case, it must be shown how and when the building materials and the lots were destined for homestead uses.<sup>3</sup>

<sup>1</sup> Neal v. Coe, 35 Iowa 407.

<sup>2</sup> Fogg v. Fogg, 40 N. H. 284.

<sup>3</sup> Franklin v. Coffee, 18 Texas 413 ; Anderson v. McKay, 30 Texas 186 ; see also Philleo v. Smalley, 23 Texas 498 ; Prior v. Stone, 19 Texas 371 ; Earle v.

§ 176. **When the selection may be made.**—A homestead can be acquired by acts done after levy and before sale on execution, where there is no fraud, and the question of homestead must be tried upon the facts existing at the time of sale.<sup>1</sup> In Arkansas, it has been held that a party having two residences on separate tracts of land, both of which had been levied upon, may, unless previous selection had been made, elect, even on the day of sale, which of the two places he recognizes as his homestead, and the selection then made will suffice to withdraw the place designated from sale, to the extent authorized by the statute.<sup>2</sup> On the other hand, in Alabama, and in Michigan, it has been held that the homestead exemption must be claimed at the time of a levy, or after, and before sale, even if the defendant had no knowledge of the sale,<sup>3</sup> and must have been set apart as a home, and for the purposes of the owner, or his family.<sup>4</sup>

The homestead may be claimed after a judgment in personam, against the husband, is docketed on foreclosure of mortgage given to secure the debt for which the mortgage was given, but which does not cover the homestead, if the declaration of homestead is filed and recorded before the balance is reported of the sale of the property, and docketed; on the ground that when a judgment in personam is rendered for the amount due, and directing the sale of the mortgaged premises, and an application of the proceeds to the payment of the judgment, the judgment, even if docketed, does not become a lien on the real property of the defendant, until the mortgaged property has been sold by the sheriff, and the balance, if any, reported by him and docketed, and then

Earle, 9 Texas 630. Contrary rule obtains in Iowa, see *Charless v. Lamber-son*, 1 Iowa 435, and *Wisner v. Farnham*, 2 Mich. 472; see the nice distinction drawn in *Williams v. Sweetland*, 10 Iowa 51, and *Holden v. Pinney*, 6 Cal. 235.

<sup>1</sup> *Stone v. Darnell*, 20 Texas 11; *Bell v. Davis*, 42 Ala. 460; *Hawthorne v. Smith*, 3 Nev. 182; *Simpson v. Simpson*, 30 Ala. 225; *Bliss v. Johnson*, 40 Ga. 297.

<sup>2</sup> *Tomlinson v. Swinney*, 22 Ark. 400; *Melton v. Andrews*, 45 Ala. 454.

<sup>3</sup> *Bell v. Davis*, 42 Ala. 460; *Simpson v. Simpson*, 30 Ala. 255; *Gresham v. Walker*, 10 Ala. 370; *Herschfeldt v. George*, 6 Mich. 457. The point was not necessary to the decision of the case. *People v. Plumstead*, 2 Mich. 465.

<sup>4</sup> *Dyson v. Shelby*, 11 Mich. 527; *Wisner v. Farnham*, 2 Mich. 472.

only for such balance.<sup>1</sup> In Nevada, the selection of a homestead may be recorded as such at any time before actual sale under execution; that is, where the property so selected possesses the characteristics appertaining to such homestead, even though an attachment has been levied upon the property prior to such selection.<sup>2</sup>

<sup>1</sup> *Culver v. Rogers*, 28 Cal. 525. In California, the Gen. Statutes declare that a judgment is a lien upon all the property of the judgment debtor, within the county in which the judgment may be docketed, or a transcript thereof filed. Code Civil Procedure, Sec. 671. But statute regulating proceedings on foreclosure of mortgage provides that when docketed, after sale is docketed, becomes a lien upon all real estate. Practice Act, amended in 1861, p. 306.

<sup>2</sup> *Hawthorne v. Smith*, 3 Nev. 182.

## CHAPTER VIII.

## FROM WHAT THE HOMESTEAD IS EXEMPT.

**§ 177.** The homestead right is favored by the Courts, and will be defended against all assaults, and fraudulent schemes to defeat it. If a deed to the homestead be delivered to the purchaser before the purchase money is paid, and the purchase money is then attached in a suit brought by the real, though not the ostensible purchaser, equity will compel the cancelation of the deed so obtained.<sup>1</sup>

**§ 178.** The homestead, in many of the States, is exempt from the lien of a judgment.—Thus, in California, it has been held that a judgment cannot become a lien upon the homestead. “It can become a lien only upon the real property of the judgment debtor, which is not exempt from execution.”<sup>2</sup>

In Iowa, even where the homestead premises acquired before the debt was contracted were sold, and the debtor transferred his homestead to other property of less value than the former homestead, acquired after the debt was created, all of which was done before judgment was rendered upon the debt, it was held that the new homestead was exempt from judicial sale from the satisfaction of the debt.<sup>3</sup> And in Texas, a debtor who has no homestead may acquire one, with all its immunity from sale under judgments against him, and it is immaterial that the judgments were in existence when he acquired the homestead; and these principles are applicable to a debtor, who, having a homestead of less value or extent

<sup>1</sup> Still v. Saunders, 8 Cal. 286.

<sup>2</sup> Bowman v. Norton, 16 Cal. 214; Hume v. Gassett, 43 Ill. 297; Bonnell v. Smith, 53 Ill. 377; Blue v. Blue, 38 Ill. 10; Green v. Marks, 25 Ill. 221.

<sup>3</sup> Pearson v. Minturn, 18 Iowa 36.

than the legal maximum, enlarges it to that maximum.<sup>1</sup> This rule is sustained in a number of the States, where a judgment is a lien upon the real estate of the judgment debtor. It is held that the lien, created by a judgment, does not attach to land purchased by a judgment debtor, after the date of the judgment for homestead purposes, on the ground that a judgment is not a lien upon after-acquired lands until execution issues and levy on such lands.<sup>2</sup>

**§ 179. A judgment against the husband alone is not a lien upon the homestead, nor is such judgment any incumbrance upon the land owned by the husband and occupied as such by himself and family.<sup>3</sup> But it is otherwise where the premises exceed the statutory value ; in case of sale of the homestead under execution, the purchaser at such sale will have acquired an equitable lien upon the surplus, which he may enforce as soon as the premises cease to be homestead.<sup>4</sup> A judgment and execution do not create a lien upon the homestead of the judgment debtor, as regards the homestead value, and the owner may sell or mortgage it.<sup>5</sup> Thus, after the owner of a homestead had executed a mortgage upon the land, but without releasing the homestead right, a judgment was recovered against him, and it was held that the homestead right could be afterwards sold and vested in the mortgagee free of the lien of the judgment.<sup>6</sup> The homestead is in the**

<sup>1</sup> *Campbell v. McManus*, 32 Texas 442 ; *McManus v. Campbell*, 37 Texas 267 ; see also *Randall v. Buffington*, 10 Cal. 491.

<sup>2</sup> *Mackey v. Wallace*, 26 Texas 526 ; *Trotter v. Dobbs*, 38 Miss. 198 ; *Stiles v. Murphy*, 4 Ohio (Ham.) 92 ; *Woods v. Mairs*, 1 Iowa (Green) 275 ; *Moody v. Doe*, 25 Miss. 484 ; *Calhoun v. Snider*, 6 Binn. (Penn.) 135 ; *McManus v. Campbell*, 37 Texas 267 ; *Campbell v. McManus*, 32 Texas 442 ; *Randall v. Buffington*, 10 Cal. 491.

<sup>3</sup> *Revalk v. Kraemer*, 8 Cal. 66 ; *Lamb v. Shays*, 14 Iowa 567 ; *Dollman v. Harris*, 5 Kan. 597 ; *Hume v. Gassett*, 43 Ill. 297 ; *Morris v. Ward*, 5 Kan. 239 ; *Bonnell v. Smith*, 53 Ill. 377 ; *Green v. Marks*, 25 Ill. 221 ; *Blue v. Blue*, 38 Ill. 10.

<sup>4</sup> *Blue v. Blue*, 38 Ill. 10 ; *McDonald v. Crandall*, 43 Ill. 231 ; *Ooe v. Smith*, 47 Ill. 225.

<sup>5</sup> *Green v. Marks*, 25 Ill. 221 ; *Bliss v. Clark*, 39 Ill. 590 ; *Conklin v. Foster*, 57 Ill. 104 ; *Brown v. Coon*, 36 Ill. 248 ; *Fishback v. Lane*, 36 Ill. 438 ; *Bowman v. Norton*, 16 Cal. 214.

<sup>6</sup> *Bonnell v. Smith*, 53 Ill. 377.



same situation with reference to a judgment lien as though no judgment existed against the debtor.<sup>1</sup>

**§ 180. Effect of judgments when the right ceases.—**When the homestead exemption shall, from any cause, cease to exist, and the premises become liable to levy and sale, then the first levy and sale after they so become liable will bind the property, whether the writ is issued on a senior or junior judgment, and the reason of this is, that it is the writ, and not the judgment, in Illinois, which creates the lien on the debtor's estate. Thus, where there were two judgments recovered against the owner of a homestead, at different times, an execution was issued on the junior judgment, and while that execution was in existence and the debtor still in the occupancy of the premises as a homestead, the debtor and his wife released to the plaintiff, in the junior judgment, their homestead right, and such release was followed by levy and sale under the execution. Subsequently, and after the debtor had abandoned the premises, an execution was sued out upon the senior judgment, and levied upon the premises, and they were sold. It was held that, upon the execution of the release of the homestead right, the premises then, for the first time, became liable to levy and sale, and the execution issued upon the junior judgment being in existence, and a release followed by a levy and sale thereunder, all the debtor's title passed to the purchaser at that sale, and could not be defeated by any subsequent sale under the senior judgment.<sup>2</sup> And where a judgment debtor, owning and occupying a homestead, sells the property to a junior judgment creditor, and surrenders possession to him, the purchaser takes the title free from any lien of judgment or claim by sale, under execution, by a senior judgment creditor.<sup>3</sup>

<sup>1</sup> *Green v. Marks*, 25 Ill. 221; *Dorsey v. McFarland*, 7 Cal. 342; *Engelbrecht v. Shade*, 47 Cal. 627-9; *Van Reynegan v. Revalk*, 8 Cal. 75; *Deffeliz v. Pico*, 46 Cal. 289; *Alley v. Bay*, 9 Iowa 509; *Yost v. Devault*, 9 Iowa 60; *Bonnell v. Smith*, 53 Ill. 377; *Coe v. Smith*, 47 Ill. 225; *McDonald v. Crandall*, 43 Ill. 231.

<sup>2</sup> *Bliss v. Clark*, 39 Ill. 590.

<sup>3</sup> *Conklin v. Foster*, 57 Ill. 104, and *Bliss v. Clark*, Id.

**§ 181. In Iowa, a judgment does not attach as a lien upon the premises used and occupied by the judgment debtor unless the debt was antecedent to the acquisition of the homestead; and a conveyance of the homestead while it is thus used and occupied, invests the grantee with a title thereto free from the lien of any judgment against the grantor; but a judgment having been obtained against the debtor, such judgment is a lien on all his real estate, except his homestead used and occupied as such; therefore, if the debtor ceases to use and occupy such premises as a home, (otherwise than by a conveyance for a valuable consideration) existing judgments attach as liens thereon, in the same manner that judgments attach as liens upon property acquired after the rendition thereof.<sup>1</sup>**

**§ 182. Relinquishment and sale, one transaction.—**In California, it is held that if while a judgment is standing against the husband, the husband and wife make a sale of the homestead, and at the same time make a relinquishment of the homestead right in the manner required by law, so that the two constitute but one transaction, and the homestead does not exceed the statutory value, the lien of the judgment will not attach to the homestead, and the proper Court will enjoin the sale upon an execution issued on the judgment. But the Court said that if the husband and wife make a relinquishment of the homestead right, and afterwards sell the homestead property, and the relinquishment takes effect before the sale, the lien of the judgment will attach to the property.<sup>2</sup>

**§ 183. Judgment, subsisting lien, enforced when unoccupied.—**A different and much more unsatisfactory interpretation as to liens of judgments on homestead property, under

<sup>1</sup> *Lamb v. Shays*, 14 Iowa 567; *Parker v. Dean*, 45 Miss. 409; *Alley v. Bay*, 9 Iowa 509; *Yost v. Devault*, 9 Iowa 60; *Green v. Marks*, 25 Ill. 221.

<sup>2</sup> *Marriner v. Smith*, 27 Cal. 649-652; *Barber v. Babel*, 36 Cal. 11; *Ackley v. Chamberlain*, 16 Cal. 181; *Deffeliz v. Pico*, 46 Cal. 289; *Engelbrecht v. Shade*, 47 Cal. 627; *Kendall v. Clark*, 10 Cal. 17; *Lamb v. Shay*, 14 Iowa 567. See *Williams v. Young*, 17 Cal. 403, where it is held that a sale under execution on judgment against husband alone is absolutely void.

similar statutes to the foregoing, has obtained in Wisconsin, and some few other States. In Wisconsin, a majority of the Court<sup>1</sup> held, that the judgment of a Court of record constitutes a lien upon all the real estate of the judgment debtor, situated in the county where the record of judgments, or a transcript thereof, is filed. That the homestead of the debtor, as constituting part of the real estate, is subject to such lien, but that the homestead premises are exempted from forced sale as long as they remain the actual homestead of the judgment debtor. But that when the homestead ceases to be occupied as such by his voluntary act, as by alienation, or otherwise, the lien of judgment then comes into effect, and may be enforced by levy and sale on execution.<sup>2</sup>

“The effect of the exemption, therefore, is merely to prevent the forced sale of the homestead premises during the time that they remain the residence of the judgment debtor. And if the judgment debtor alienates the homestead, the vendee takes it subject to the lien of the judgment.” Smith, J., dissenting, said, with much reason, that such a construction of the law was open to the objection that “the homestead of the unfortunate debtor would be his prison,” and that the beneficial enactment of the legislature was but “an ingenious device to confine all energies of the man to the narrow limit of his homestead.” The ruling was affirmed in the case of *Trustees, etc., v. Schell*.<sup>3</sup>

**§ 184. In Minnesota the same rule obtains as that in Wisconsin.**<sup>4</sup> Where a judgment had been docketed against

<sup>1</sup> *Hoyt v. Howe*, 3 Wis. 753; to the same effect are the following: *Allen v. Cook*, 26 Barb. (S. C.) 374; *Chamberlin v. Lyell*, 3 Mich. 448; *Lawton v. Bruce*, 39 Maine 488; *Hershfeldt v. George*, 6 Mich. 456.

<sup>2</sup> The legislature of Wisconsin, in 1858, after the decisions above noticed were rendered, enacted that no judgment, in either Federal or State Court, should be a lien upon the homestead.

<sup>3</sup> 17 Wis. 308; *Folsom v. Carli*, 5 Minn. 333; *Tillotson v. Millard*, 7 Minn. 513; *Cogel v. Mickow*, 11 Minn. 475. For contrary rule see *Green v. Marks*, 25 Ill. 221; to the same effect are the following: *Dorsey v. McFarland*, 7 Cal. 342; *Van Reynegan v. Revalk*, 8 Cal. 75; *Alley v. Bay*, 9 Iowa 509; *Yost v. De Vault*, 9 Iowa 60; *Lamb v. Shay*, 14 Iowa 569.

<sup>4</sup> But this has been changed by statute, Act 1860, which provides that a judgment debtor may remove from or sell the homestead without subjecting it thereby to sale on execution.

the homestead owner, it was held that the lien of judgment attached to the homestead as well as any other real property of the debtor, and the exemption of the homestead was only an exemption from sale on execution while occupied by the debtor and his family. The exemption did not affect the lien of judgment, and when the judgment debtor abandoned the property as a residence, or conveyed it to another, the exemption ceased, and the judgment creditor had then the right to enforce his lien by a sale of the premises on execution, and the grantee took the premises subject to the lien of the judgment.<sup>1</sup>

**§ 185. Right of the State, as affecting the homestead.** The State is not in any better position than the citizen, in regard to the collection of debts as against the homestead of the debtor.<sup>2</sup> In Illinois, it is said that a judgment rendered against a town collector on his official bond is like any other judgment, and creates no lien which can be enforced against his homestead. The act "making a town collector's bond a lien upon all his real estate does not repeal the homestead exemption act, so far as his bond is concerned."<sup>3</sup> In Kentucky the contrary rule obtains, where it is held that the homestead act does not apply to the State, and that the homesteads of the sureties of a sheriff were subject to an execution in favor of the State which issued on a judgment rendered against the sheriff and his sureties for public dues. The Court said that the commonwealth is not embraced by an act which is made to operate between individuals, unless there is something in the act which shows an intention to subject the State to the same rule.<sup>4</sup>

<sup>1</sup> *Whitworth v. Lyons*, 39 Miss. 467; in Miss. changed by statute of 1870; *Folsom v. Carli*, 5 Minn. 333; *Tillotson v. Millard*, 7 Minn. 513; see, per contra, *Green v. Marks*, 25 Ill. 221; *Lamb v. Shay*, 14 Iowa 567.

<sup>2</sup> *Richards v. Chace*, 2 Gray 383; *Wilds v. Vanvoorhis*, 15 Gray 139; *Williams v. Williams*, Sup. Ct. Tenn., April Term, 1874.

<sup>3</sup> *Hume v. Gossett*, 43 Ill. 297.

<sup>4</sup> *Commonwealth v. Cook*, 8 Bush 225.

## CLAIMS AND LIENS WHICH MAY AFFECT THE HOMESTEAD.

**§ 186. Where a judgment attaches to real property as a lien, and if the same real property is sold after the lien of a judgment has attached, and it be conveyed to a third person, the lien of judgment will follow the land in such third person's hands, though he may have purchased the land in ignorance of the fact, and such innocent purchaser will not be able to claim homestead rights in the land until such lien of judgment has been satisfied.<sup>1</sup>**

So of an award that has been made the judgment of a Court of record, such award, thus recorded, attaches to real property as a lien, in the same manner as a judgment, and will prevent the homestead right from attaching till compliance with such award.<sup>2</sup>

**§ 187. Effect of the situation of the parties and property, when liability incurred.**—The right to claim the benefit of the homestead act is controlled by the situation of the property at the time the debt was contracted or the lien attached, and not by the subsequent acts of the debtor and his family. If the premises are not exempt at the time of the creating of the debt or lien, a subsequent occupation of the premises, as homestead, would not render them exempt.

On the other hand, the homestead may have been exempt at the time the debt was contracted, and become liable by its subsequent abandonment.<sup>3</sup>

**§ 188. Lien of judgment on note given for debt, barred by statute of limitations.**—In some States, it is held that where a homestead is liable for debts contracted before a certain date, and the debt is barred by the statute of limitations, it seems that a note given to secure the debt, though given after the declaration of homestead, will be a prior equity, and judgment thereon will be a lien on the homestead.<sup>4</sup>

<sup>1</sup> *Gunn v. Miller*, 43 Ga. 377; *Hale v. Heaslip*, 16 Iowa 451.

<sup>2</sup> *Gill v. Mizell*, 43 Ga. 589.

<sup>3</sup> *Titman v. Moore*, 43 Ill. 170; *Upman v. Banks*, 15 Wis. 449; 23 Cal. 277.

<sup>4</sup> *Wood v. Lord*, 51 N. H. 448; *Strachn v. Foss*, 42 N. H. 43.

**§ 189. Lien of judgment on homestead, allowed to slumber for years, still a lien.**—And where a creditor who has a lien of judgment on all the real estate of the debtor, including his homestead, if he lets his lien sleep for several years, until all the property of the debtor, except the homestead, has been exhausted to satisfy junior judgment liens in the hands of other parties, is not thereby precluded from asserting his lien on the homestead, although his lien, if it had been enforced while the debtor had other property, that other property must have been exhausted before the homestead could have been held liable. His delay places him in no worse position than if his lien had been on the homestead alone. This would be the result even where the statute requires that all other property of the debtor, subject to execution, shall be exhausted before the sale of the homestead.<sup>1</sup>

**§ 190. Lien of judgment in Justice's Court—Recording transcript—Intervening act of legislature.**—But where judgments rendered in Justices' Courts are not liens upon real estate, until a transcript is filed in clerk's office of a Court of record, or in the recorder's office of the county where the property may be situated, they do not affect the homestead previous to such filing. And this lien may be defeated by intervening legislative act, where the taking effect of an act of the legislature intervenes between the rendition of such judgment and the filing of the transcript, discharging the homestead from the lien of all judgments.

It is held that the right of the judgment creditor to perfect his lien upon the real estate of his debtor, by filing a transcript of his judgment, is not a vested right, and the legislature, by a change in the law, can deprive him of such inchoate right.<sup>2</sup>

**§ 191. But the change in such law does not apply to executions issued upon judgments which had become liens**

<sup>1</sup> *Denegre v. Haun*, 14 Iowa 240; *Tuttle v. Howe*, 14 Minn. 145; *Bartholomew v. Hook*, 23 Cal. 277.

<sup>2</sup> *Borrman v. Schober*, 18 Wis. 437.

prior to the passage of the law.<sup>1</sup> In Wisconsin, prior to the Act of 1858, the judgment of a Court of record was a lien upon the homestead of the debtor, but the exemption protected it from forced sale on execution during the time it was occupied as a homestead, but when the debtor ceased to occupy it or alienated it, the lien could be enforced, as in other cases.<sup>2</sup>

**§ 192. Lien of judgment upon the homestead before filing notice—Wife's interest.**—In California, where a house and lot had been occupied by the husband and wife since the year 1859 as their homestead, but no declaration, under the Act of 1862, was made and filed, until the wife did so on 11th of June, 1863 ; the husband had confessed a judgment on June 6th of the same year. This judgment became a lien upon the homestead, and rendered it liable to be sold on execution, but the wife, by filing her declaration, acquired such an interest in the homestead as to enable her to maintain an action against the sheriff to compel him to exhaust her husband's personal property, and his other real estate, before proceeding to sell the homestead.<sup>3</sup>

**§ 193. In Iowa, a homestead is subject to the payment of debts created prior to its acquisition, and no distinction obtains between domestic and foreign debts.**<sup>4</sup>

But a judgment does not attach as a lien upon premises (under the statute of Iowa) held by the judgment debtor as a homestead, either while occupied as such, or when sold and the possession surrendered by the husband and wife.<sup>5</sup> Nor is it sufficient to make a judgment a lien upon the homestead, (otherwise than as a mechanic's lien) to show that it was for materials furnished, and labor performed on the homestead property. It is essential to show that the liability arose before it was occupied as a homestead.<sup>6</sup>

<sup>1</sup> *Seamans v. Carter*, 15 Wis. 548.

<sup>2</sup> *Simmons v. Johnson*, 14 Wis. 523.

<sup>3</sup> *Bartholomew v. Hook*, 23 Cal. 277 ; See case in Wisconsin and Tennessee, Secs. 187, 188, 190.

<sup>4</sup> *Laing v. Cunningham*, 17 Iowa 510 ; *Sloan v. Waugh*, 18 Iowa 224.

<sup>5</sup> *Lamb v. Shays*, 14 Iowa 567 ; *Cummings v. Long*, 16 Iowa 41.

<sup>6</sup> *Delevan v. Pratt*, 19 Iowa 429.



**§ 194. A change of homestead by a judgment defendant,** from one parcel of land to another, cannot displace or affect the liens of judgment that had accrued before such change.<sup>1</sup> But the owner may change his homestead ; and the new homestead, to the extent in value of the old one, will be exempt in all cases in which that would have been.<sup>2</sup>

**§ 195. Judgment rendered after purchase of land, but before occupancy, or before passage of the law, valid lien.**—The homestead may be subjected to sale on execution rendered on a debt contracted prior to the occupancy of the premises as a homestead, or on a claim which accrued before the passage of the exemption act.<sup>3</sup> And this lien will be valid, even though the debt was not contracted till after the purchase of the land upon which the homestead improvements were subsequently made.<sup>4</sup>

**§ 196. Lien of judgment in Texas, purchaser under deed of trust.**—Where a deed of trust of the homestead was given, duly signed and acknowledged by the husband and wife, and subsequently sold under such deed of trust, there being a judgment lien on the premises, it was held, in Texas, that the purchaser under such deed of trust took the premises subject to the lien of the judgment.<sup>5</sup>

**§ 197. Homestead not subject to attachment.**—An attachment is but a preliminary execution, so that a homestead is not subject to attachment any more than it is to an execution, that is, final process.<sup>6</sup>

<sup>1</sup> Elston v. Robinson, 21 Iowa 531.

<sup>2</sup> Furman v. Dewell, 35 Iowa 170.

<sup>3</sup> Elston v. Robinson, 23 Iowa 208 ; Howard v. Wilbur, 5 Allen 219 ; Hale v. Heaslip, 16 Iowa 457 ; Page v. Ewbank, 18 Iowa 580 ; Charless v. Lamberson, 1 Iowa 435 ; Seaman v. Carter, 15 Wis. 544 ; Dopp v. Albee, 17 Wis. 590 ; Trustees v. Schell, 17 Wis. 308.

<sup>4</sup> Id. Iowa cases above cited ; also, Christy v. Dyer, 14 Iowa 438 ; Elston v. Robinson, 23 Iowa 208 ; Cole v. Gill, 14 Iowa 527 ; Williams v. Sweetland, 10 Iowa 51.

<sup>5</sup> Saul v. Epperson, 38 Texas 492. As to effect of deed of trust so signed, see Jordan v. Peak, 38 Texas 429.

<sup>6</sup> Grubbs v. Ellyson, 23 Ark. 287 ; Fogg v. Fogg, 40 N. H. 284.



**§ 198. Selection of homestead after attachment.**—Nor is a lien by attachment such a lien as will sustain an execution levied upon the homestead, recorded after the attachment, but before judgment. In such case, the judgment does not relate back to the date of the attachment.<sup>1</sup>

**§ 199. Homestead not affected by extrinsic debts.**—The homestead is not to be affected by levy and sale under judicial process for extrinsic debts or charges. If the premises are in fact impressed with the character of homestead, then the levy and sale are void and pass no title to the purchaser.<sup>2</sup>

#### TORT.

**§ 200. Effect on homestead of judgments in actions of tort.**—There are conflicting decisions as to the question whether a homestead is exempt from sale on execution for damages recovered in an action of tort.

In New York, it was held that a party who has a good cause of action for a breach of promise of marriage, has no debt against the delinquent party to the contract, which he can recover out of defendant's premises under the Homestead Exemption Act of 1850.<sup>3</sup> But in *Shonber v. Kilmer*,<sup>4</sup> a contrary opinion was held, Willard, J., saying: "The Act of 1850 does not exempt the homestead of a householder from sale on execution, except for debts contracted after the passage of the law. If the execution be issued upon a judgment in tort, the homestead is not exempt; a judgment for costs in an action of tort falls within the same rule."

The point seems to have been decided finally, so far as New York is concerned, in *Lathrop v. Singer*,<sup>5</sup> where it was held, that the Act of 1850 does not contemplate an exemp-

<sup>1</sup> *Hawthorn v. Smith*, 3 Nevada 185.

<sup>2</sup> *Deffeliz v. Pico*, 46 Cal. 289, citing and approving *Kendall v. Clark*, 10 Cal. 17; *Williams v. Young*, 17 Cal. 403.

<sup>3</sup> *Cook v. Newman*, 8 How. N. Y. Pr. 523.

<sup>4</sup> 8 How. N. Y. Pr. 527.

<sup>5</sup> 39 Barb. 396.

tion of the homestead from execution issued upon a judgment recovered in an action of tort. The act exempts the homestead only from execution for debts contracted.

In Pennsylvania, it is held, that the law exempting property from levy and sale on execution, extends only to cases of debt on contract. A judgment for costs is of the same nature as debt on contract, so far as the exemption law affects the rights of the parties. The fact that costs accrued against a plaintiff who failed in an action of tort, makes no difference so far as relates to the exemption law: "when a plaintiff in an action of trover has lost, and the judgment is against him for costs, he is not thereby put into the situation which the defendant would have occupied if the luck had been reversed."<sup>1</sup>

In Georgia, prior to 1868, the same rule prevailed as in New York, where it is held that the homestead exemption acts do not protect property from judgments founded on torts. They apply "expressly and exclusively to judgments founded on contracts."<sup>2</sup>

**§ 201. Not affected by judgments in actions of tort.** In North Carolina, it is held, that a homestead and personal property exemption, under Art. X. of the constitution, and the laws passed in pursuance thereof, cannot be sold under an execution issued upon a judgment rendered in an action of tort.<sup>3</sup>

The better rule, and one in entire harmony with the universally expressed object and policy of the homestead law, finds expression in Wisconsin, in the case of *Smith v. Omans*,<sup>4</sup> wherein it is said that the homestead of a judgment debtor is not liable to forced sale on execution, although the judgment was rendered in an action of tort; and the reason of this seems to be that the object of the exemption law is to protect the family of the debtor, as well as himself. "Yet this beneficent purpose would be often wholly defeated, if the homestead could be swept from under the family whenever the husband chose to incur a liability for which an action of tort could be maintained."

<sup>1</sup> *Lane v. Baker*, 2 Grant's Cases 424.    <sup>3</sup> *Dellinger v. Tweed*, 66 N. C. 206.

<sup>2</sup> *Davis v. Henson*, 29 Ga. 345.

<sup>4</sup> 17 Wis. 395.

In Illinois, substantially the same rule is adopted as that of Wisconsin; it is there held that a homestead is not liable to forced sale in satisfaction of damages recorded in an action of tort. The language of the act is, the homestead is exempt "from levy and forced sale under any process or order from any Court of law or equity, for debts contracted from and after the fourth day of July, 1851." A judgment for tort is not a debt contracted, but the law of 1857 declared it to be the object of the legislature to prevent the alienation of the homestead in any case except by the consent of the wife. In the light of both these laws, the Supreme Court of Illinois has frequently held that it was the evident intent of the legislature to protect the homestead as a shelter for the wife and children independently of any act of the husband. He cannot deprive them of their right to it without the consent of the wife, either by his contract or torts. There is no more reason, so far as the wife is concerned, for permitting the homestead to be sold for the husband's tort, than for his violation of a contract; and it is the policy of the law to forbid it being sold under a judgment and execution in either case.<sup>1</sup>

#### SPECIFIC LIENS.

§ 202. In nearly all the States the homestead is affected by certain liens, such as vendors' and mechanics' liens. But under some of the homestead laws, no exception was made of any nature or kind. For instance, in Texas, under the Constitutions of 1845 and 1860, no provision was made that the homestead should be subject to any lien, whether vendors', mechanics', or laborers', or the lien of taxes. But the Courts always held that the homestead right was subordinate to the vendor's right to recover his land;<sup>2</sup> that the homestead right could not commence until the vendor's lien had been satisfied.

<sup>1</sup> Conroy v. Sullivan, 44 Ill. 451.

<sup>2</sup> Stone v. Darnell, 20 Texas 12; Montgomery v. Tutt, 11 Cal. 191; Farmer v. Simpson, 6 Texas 303; Burnes v. Gray, 7 Iowa 26; Dillon v. Byrne, 5 Cal. 455; Shepherd v. White, 11 Texas 354; Phelps v. Conover, 25 Ill. 309; Succession of Faulkes, 12 La. An. 537; McHendry v. Reilly, 13 Cal. 75.

That the property was not homestead as far as the vendor's right was concerned. Other liens were not so favored by the Courts. The homestead, once acquired, was exempt from all debts, whether liens or not; unless such liens had been created by a written contract to perform work or labor upon the premises before they became homestead, and to hold the homestead liable for such labor performed, which adds to the value of the homestead, and which contract required to be duly recorded.<sup>1</sup> And this lien so created extended only to the sum mentioned in the contract; if in the course of the work on the premises, a larger amount than was stipulated in the contract should become due to the person performing such work, there was no lien in favor of such person for the excess over the amount provided for in the contract.<sup>2</sup>

But, under the twelfth article of the Constitution of 1869, the legislature is empowered to protect a homestead of the value of \$5,000, exclusive of the improvements, from forced sale, except for the purchase price thereof, or for taxes, or for labor and materials furnished therefor.

**§ 203. Where homestead exempt from sale of taxes, except those levied thereon, not affected by change of law.**—Where, under the laws in force at the date of the levy of a tax, the homestead was exempt from sale for any taxes except those levied thereon, though not separately listed, a subsequent change in the law would not affect the right of the owner. At a sale made for such taxes, it could not be sold in connection with other lands, in such manner as to compel the owner to pay the taxes on such other lands in order to save his homestead from absolute loss.<sup>3</sup>

**§ 204. Material man cannot enforce lien on homestead.** In Minnesota, it is held that a material man who furnishes materials for the erection or repairs for a house on exempted property, cannot enforce a lien, from the fact that the lien can only be enforced by seizure and sale of the property on

<sup>1</sup> *Merchant v. Perez*, 11 Texas 20.

<sup>2</sup> *Merchant v. Perez*, 11 Texas 20; *Potahinsky v. Krempan*, 26 Texas 307.

<sup>3</sup> *Penn. v. Clemans*, 19 Iowa 372.

which he claims the lien, while the statute and the constitution of that State forbid the forced sale of exempt property. But such material man's lien will attach as against a person who, in good faith and without notice, purchases the premises subsequently to the erection of the building in which the materials are used, and prior to the recording and filing of the account.<sup>1</sup>

**§ 205. Necessaries furnished family in connection with homestead.**—In Georgia, the homestead is not exempt from a claim for necessities furnished to the family in connection with the enjoyment of the homestead,<sup>2</sup> but a judgment obtained against a widow for the rent of a house, other than the homestead property, was not within the purview of the act, or in accordance with the true intent and meaning thereof.<sup>3</sup>

**§ 206. Merger in note—Laborer's lien—Services.**—A promissory note, given for labor, does not change the character of the claim, and is still within the exception of the homestead act in New Hampshire.<sup>4</sup> But the professional services of a physician do not constitute a claim for labor within the meaning of the act, and a promissory note, executed by the debtor and his wife for such services, but without a mortgage of the homestead, is not a release or waiver of the exemption.<sup>5</sup>

#### PRIOR DEBTS.

**§ 207. Statutory protection of existing debts on acquisition of homestead.**—In Massachusetts, under the Homestead Act of 1855, C. 238, which provides that "no property,

<sup>1</sup> Cogel v. Mickow, 11 Minn. 475.

<sup>2</sup> The Act of 1869 provides that the homestead shall be exempt from forced sale, etc., "excepting stock, provisions, and other articles used in making the crops, necessities for the family, medical services, and tuition, etc."

<sup>3</sup> Bazemare v. Davis, 48 Ga. 339.

<sup>4</sup> Weymouth v. Sanborn, 43 N. H. 171.

<sup>5</sup> Reed v. Defebaugh, 24 Penn. 495 ; Weaver's Estate, 25 Penn. 434.

by virtue of this act, shall be exempted from levy, for any debt contracted previous to the passage of this act," it is held that a debtor who becomes insolvent, owing debts contracted before the passage of the act, exceeding the amount allowed as a homestead exemption, must surrender his homestead to his assignee in insolvency.<sup>1</sup> And an alienation of it by the owner and his wife to a third person, will be a fraud on the creditors, and void.<sup>2</sup>

Under the foregoing act, the homestead privilege was not operative as against debts contracted prior to its acquisition, but if, after payment of those debts, any residue were left, the homestead exemption would be operative as to that.<sup>3</sup>

**§ 208. A note given for money borrowed on the day of the deed, and applied in part payment of the purchase-money, was considered an existing debt, at the time of the purchase of the homestead, and was a lien thereon.<sup>4</sup> But where, since the passage of the homestead act, a note secured by mortgage has been given in exchange for another note which was not secured, and had been made previous to the passage of the homestead act, it will be regarded as having been taken in payment of the first note, and an extinguishment of the debt secured thereby.<sup>5</sup>**

**§ 209. Where a homestead debtor becomes insolvent, those creditors whose claims accrued before the right of homestead was acquired, are entitled to have the whole amount of the homestead value realized by the assignee paid to them in satisfaction of their claims, and they may come in with the other creditors against the balance of the property, if they have not been paid in full. The reversionary interest in the land, after the expiration of the homestead right, should be distributed among the general creditors.<sup>6</sup>**

<sup>1</sup> Woods v. Sanford, 9 Gray 16 ; Rice v. Southgate, 16 Gray 143.

<sup>2</sup> Beals v. Clark, 13 Gray 19.

<sup>3</sup> Clark v. Potter, 13 Gray 21.

<sup>4</sup> Stevens v. Stevens, 10 Allen 146.

<sup>5</sup> Adams v. Jenkins, 16 Gray 146 ; Burns v. Thayer, 101 Mass. 426.

<sup>6</sup> White v. Rice, 5 Allen 73 ; Woods v. Sanford, 9 Gray 16 ; Rice v. Southgate, 16 Gray 142 ; Gibbs v. Bryant, 1 Pick. 121 ; Appleton v. Bascom, 3 Met. 169.

§ 210. **Exemption law does not apply to pre-existing debts.**—IN NEW HAMPSHIRE, the homestead exemption act does not apply to contracts made on the 1st Jan., 1852, or prior to that date, but only to those made after that day. Judgment was recovered on a note dated May, 1853, signed by Dudley and one Robinson. But it appeared that this note was given for two notes, previously given by Dudley, one of them directly to the plaintiff, and the other to one Palmer, which he indorsed to the plaintiff, and both dated before Jan. 2d, 1852. It was held that the homestead exemption did not apply in this case in favor of Dudley, though it would in favor of Robinson.<sup>1</sup>

§ 211. **In Iowa, a homestead is not exempt from sale for the payment of debts contracted prior to the time any improvements were made upon the land, and before it was used in any way as a home, or for the purpose of a homestead.**<sup>2</sup>

And it is further liable to debts contracted in another State before its acquisition, and is subject to sale therefor after the exhaustion of the other property of the debtor liable to execution.<sup>3</sup>

§ 212. **Delivery bond not a contract.**—The Exemption Law of Mississippi of 1841, exempting certain property from sale therein mentioned, only applies to contracts made after its passage: held, that a delivery bond cannot be regarded as a contract in contemplation of that statute.<sup>4</sup>

§ 213. **Statutes excluding existing debts from the exemption—Merger—Marshaling assets.**—IN KENTUCKY, it is held that the homestead exemption provided for by the Act of 1866,<sup>5</sup> does not apply to debts or liabilities created or incurred before June, 1866, at which time the act took effect. It does not apply to a note executed after that date,

<sup>1</sup> Ladd v. Dudley, 45 N. H. 61; Marsh v. Alford, 5 Bush (Ky.) 392; Webster v. Bronston, 5 Bush (Ky.) 521; Kibby v. Jones, 7 Bush 243; see Sec. 213.

<sup>2</sup> Hyatt v. Spearman, 20 Iowa 510.

<sup>3</sup> Laing v. Cunningham, 17 Iowa 510; Brainard v. Van Kuran, 22 Iowa 264.

<sup>4</sup> Smith v. Brown, 23 Miss. 810.

<sup>5</sup> Meyers' Sup. 714.



as a renewal of a note given before that date. The renewal of a note is not a satisfaction of a debt, but only a change of the evidence of it.<sup>1</sup> Nor does the act apply to or embrace a note executed after the date of the taking effect of the act, in payment of an account for articles purchased and delivered before that date.<sup>2</sup>

Where a house and lot under a deed of trust for the equal pro rata benefit of creditors, sold for \$2,627<sup>77</sup>/<sub>100</sub>, in which a homestead right was reserved in the deed and claimed by the grantors, prior debts (to June 1st, 1866,) amounted to \$1,616<sup>81</sup>/<sub>100</sub>, subsequent debts amounted to 2,052<sup>43</sup>/<sub>100</sub>. The Circuit Court adjudged a pro rata distribution of the entire fund, except \$1,000, among all the creditors, and then applied so much of the \$1,000 as was necessary to fully satisfy the prior debts; thus leaving \$101<sup>40</sup>/<sub>100</sub> undisposed of to the homestead claimant, who appealed. By an equal division of the Court of Appeals, the judgment of the Circuit Court was affirmed.<sup>3</sup>

It has also been held that the homestead act did not apply to a judgment which was recorded on a liability which existed prior to June 1st, 1866, and that the act did not apply to the costs; that the costs of all such cases are only incidents attached thereto, and must be governed by the laws applicable to the debt or liability out of which they grew.<sup>4</sup>

And where part of a debt was contracted prior to June, '66, and part after said date, and a note given for the whole debt, it was held that the homestead was exempt as to that portion of the consideration of the note contracted after the law took effect, but liable for the portion contracted prior to the act taking effect.<sup>5</sup>

**§ 214. Homestead not affected by prior debts in California and in Texas.**—The homestead is not affected by debts existing prior to the acquisition of the homestead; even if the claimant be in a state of absolute insolvency, it

<sup>1</sup> Lowry v. Fisher, 2 Bush 70; Kibby v. Jones, 7 Bush 243; Pryor v. Smith, 4 Bush 379.

<sup>2</sup> Marsh v. Alford, 5 Bush 392. See Secs. 207, 210.

<sup>3</sup> Webster v. Bronston, 5 Bush 521.

<sup>4</sup> Knight v. Whitman, 6 Bush 51.

<sup>5</sup> Kibby v. Jones, 7 Bush 243.



matters not, for the law protects the homestead against debts contracted prior, as well as those contracted after the destination of the property as a homestead, and this is equally the case, whether he was married or single when the debt was contracted.<sup>1</sup>

#### VENDOR'S LIEN.

**§ 215. No homestead right can be acquired in property upon which purchase-money is due, as against the claim of the vendor; though it may be impressed with that character, it will remain subordinate to the lien of the vendor, whether that lien be created by mortgage or otherwise, until it is removed in some lawful manner.<sup>2</sup>**

The case of *Hopper v. Parkinson*, 5 Nev. 233—referred to in note—was a foreclosure suit on a mortgage given by the husband to secure the purchase-money of land, and made contemporaneously with the deed of the land to him; the wife, being permitted to defend, set up a homestead right, and it was held that neither husband or wife could acquire any such right as against the mortgage debt. But it was said that a suit to foreclose a mortgage given to secure the purchase-money, is not a suit for the enforcement of a vendor's lien.

<sup>1</sup> *North v. Shearn*, 15 Texas 176; *Randall v. Buffington*, 10 Cal. 493; *Culver v. Rogers*, 28 Cal. 526; *In re Henkel*, 2 Sawyer C. C. 305.

<sup>2</sup> *Burford v. Rosenfield*, 37 Texas 42; *Campbell v. McManus*, 32 Texas 442; *McManus v. Campbell*, 37 Texas 267; *Hopper v. Parkinson*, 5 Nev. 233; *McHendry v. Reilly*, 13 Cal. 75; *Dillon v. Byrne*, 5 Cal. 456; *Lassen v. Vance*, 8 Cal. 271; *Calhoun v. Calhoun*, 2 Rich. N. S. 284; *Baker v. Ramer*, 27 Texas 52; *Tunstall v. Jones*, 25 Ark. 272; *Farmer v. Simpson*, 6 Texas 307; *Dart on Vendors*; *Doyden v. Frost*, 3 Myl. and C. 670; *Parker v. Kelly*, 10 S. & M. 184; 6 S. & M. 490; *Meigs R.* 52; *Tamer v. Hicks*, 4 S. & M. 300; 4 Litt. R. 289; 5 Monroe 287; *Pinchain v. Collard*, 13 Texas 333; *Magee v. Magee*, 51 Ill. 500; *Austin v. Underwood*, 37 Ill. 438; *Eyster v. Hathaway*, 50 Ill. 521; *Cossell v. Ross*, 33 Ill. 244; *Weider v. Clark*, 27 Ill. 251; *Chambliss v. Phelps*, 39 Ga. 386; *Lane v. Collier*, 46 Ga. 580; *Hawks v. Hawks*, 46 Ga. 204; *Christy v. Dyer*, 14 Iowa 438; *Cole v. Gill*, 14 Iowa 527; *Burnap v. Cook*, 16 Iowa 149; *Barnes v. Gay*, 7 Iowa 26; *Pratt v. Delavan*, 17 Iowa 307; *Kyles and Dunlap's Appeal*, 45 Penn. St. (9 Wright) 353; *Buckingham v. Nelson*, 42 Miss. 417; *Calhoun v. Calhoun*, 2 Rich. (S. C.) N. S. 284; *Williams v. Young*, 17 Cal. 403; *Montgomery v. Tutt*, 11 Cal. 190; *Skinner v. Beatty*, 16 Cal. 156; *New England M. Co. v. Merriam*, 2 Allen 390.

**§ 216. Tenure of the vendee, in the nature of a trust for vendor.**—In *Tunstall v. Jones*,<sup>1</sup> it is said, the lien of a vendor is in the nature of a trust, and equity regards the vendee as holding the estate in trust for the payment of the purchase-money, and he cannot set up any adverse title or do anything which can place him in a position inconsistent with the interests of the trust, and therefore, though by the appropriation of the land as a homestead, it becomes exempt from execution, it still continues subject to the lien. But the bare existence of the lien has no such effect as to remove the exemption and subject the homestead to sale under execution.

In Texas, the same principle and reasoning is maintained, where it is said that the vendor of land who retains a lien thereon for the purchase-money, has the superior right to the land as against his vendee until payment of the purchase-money has been made ; and his deed to the purchasers, reserving such lien, does not vest absolute title in them until the purchase money is paid, previous to which they hold the property in subordination to the vendor's right.

**§ 217. Note for purchase-money barred by statute of limitations.**—It is further held in Texas, that even if the notes given for the payment of the purchase-money became barred by the statute of limitations it matters not. The purchaser cannot obtain absolute title to the property, as against the vendor, without the payment of the purchase-money.<sup>2</sup>

Right of homestead does not attach until the property is paid for. Where F bargained for a tract of land in 1851, giving his notes for the purchase-money, receiving his vendor's bond for the title ; in 1856, F being then dead, and the land not being paid for, the Probate Court set aside 200 acres of the tract as a homestead for the family. It was held that this order of the Court was without authority of law, for the reason that the purchase-money remained unpaid and the title had never vested in F.<sup>3</sup>

<sup>1</sup> 25 Ark. 272.

<sup>2</sup> *Dunlap v. Wright*, 11 Texas 597 ; *Baker v. Ramer*, 27 Texas 52 ; *McManus v. Campbell*, 37 Texas 267.

<sup>3</sup> *McCreery v. Fortson*, 35 Texas 641 ; *Joplin v. Fleming*, 38 Texas 526.

But it is not essential in that State that the fee should pass before the homestead right attaches. This right attaches whenever premises are dedicated to homestead purposes, even before the purchase-money is fully paid, though in the latter case the property remains subject to the vendor's lien.<sup>1</sup>

**§ 218. Money borrowed, to pay pre-existing debt created for purchase of homestead,** is not a lien for purchase-money ;<sup>2</sup> thus it was held that where a party advances money to relieve a homestead from the lien for unpaid purchase-money, and takes from the purchaser and his wife notes for the amount advanced, and a deed of trust to secure their payment, he is not thereby subrogated to the rights of the vendor, and the homestead is relieved from the lien for purchase-money. In such case, the notes and the deed of trust, being for money loaned, the contract is not such a one as can subject the homestead to forced sale, whatever may have been the intention of the parties to the contract, at the time.<sup>3</sup> But it is otherwise where the loan and the payment are one transaction ; thus, in California, it was held, that where a party advances money to pay the purchase-money which had previously been secured by a mortgage on the homestead, and for such advance takes, as security, a mortgage on the homestead, signed by the husband alone, the debt is, to all intents and purposes, the same, though the creditor may be changed ; and the vendor's lien for purchase-money, represented by the mortgage to the new creditor, will be paramount to the homestead claim, especially where the satisfaction of the vendor's lien and the execution of the new mortgage are contemporaneous acts.<sup>4</sup>

**§ 219. What may be united with lien for purchase-money.**—It seems that, in Illinois, an unpaid vendor of land may unite to his lien, for the purchase-money, a debt of a different nature, in a mortgage or deed of trust, and if the mortgagor omits to pay, or offer to pay, that portion which is

<sup>1</sup> *McManus v. Campbell*, 37 Texas 267.

<sup>2</sup> *Austin v. Underwood*, 37 Ill. 438. See *Griffin v. Blanchard*, 17 Cal. 71.

<sup>3</sup> *Malone v. Kauffman*, 38 Texas 454.

<sup>4</sup> *Carr v. Caldwell*, 10 Cal. 384.

purchase-money, and a sale is had under the deed of trust or mortgage, in default thereof the title will pass to the purchaser, and he may recover the premises in ejectment.<sup>1</sup>

In California, it has been held that a vendor can add nothing to the debt created for the purchase-money of the homestead, except interest on the same. He cannot tack on to his lien any subsequent debt which may since have become due to him, not even if the husband executes a mortgage on the homestead without the concurrence of the wife.<sup>2</sup> Nor can he charge the land by an agreement to pay interest in addition to the purchase-money.<sup>3</sup>

**§ 220. Change in the form of the instrument for purchase-money.**—No change in the form of the instrument given to secure the purchase-money, as, for example, from a mortgage to a deed of trust, will avail to change the character of the debt. When purchase-money is the consideration in any one instrument, it will so continue in any other.<sup>4</sup>

**§ 221. Third person paying money to vendor assumes the relation of vendor to purchaser.**—Where a purchaser of land went into possession and occupied it as a homestead: while so in possession, he procured a third person to pay the purchase price to the vendor, promising to execute a mortgage to secure the payment of the money as soon as he obtained a deed. He obtained a deed, but refused to execute the mortgage. Upon bill filed, by the party paying the money, against the purchaser, to enforce his lien upon the land, it was held, that the money paid by the complainant, having been paid by him directly to the vendor for the purpose of having the land conveyed to the purchaser, must be regarded as the purchase-money of the premises, against which defendant could not assert the homestead exemption.<sup>5</sup>

So, also, where a party owning and residing upon a home-

<sup>1</sup> *Austin v. Underwood*, 37 Ill. 438.

<sup>2</sup> *Dillon v. Byrne*, 5 Cal. 456; *Barnes v. Gay*, 7 Iowa 26.

<sup>3</sup> *McHendry v. Reilly*, 13 Cal. 75.

<sup>4</sup> *Austin v. Underwood*, 37 Ill. 438.

<sup>5</sup> *Magee v. Magee*, 51 Ill. 500; *Lassen v. Vance*, 8 Cal. 271; *Austin v. Underwood*, 37 Ill. 438.

stead, purchases and receives a conveyance of an adjoining tract to be used in connection with and as part of the homestead, and procures the purchase-money for the adjoining tract to be paid by a third person, as a loan to the purchaser; the money thus loaned will be regarded as the purchase-money for the land, as against the claim of homestead by the purchaser, for whom it was paid; and in this case the distinction was taken between such a case and one where money was loaned to pay a pre-existing debt created for the purchase of the homestead.<sup>1</sup>

**§ 222. Conduct on part of vendor which will bar assertion of claim.**—Any conduct on the part of the vendor of real estate which shows an intention to give up his lien for the purchase-money, will be a bar to its assertion; and the acceptance of other security, or the personal security even of the husband and wife, is sufficient to raise the presumption that he means to give up his lien.<sup>2</sup>

**§ 223. Where money is simply borrowed,** and then, after it is obtained, is used to pay the purchase-money, it will not be a lien upon the homestead. The payment and the loan must in equity be one transaction, to enable the lender to claim a lien upon the homestead.

The statute, “in declaring that the homestead right should not be claimed against a debt due for the purchase-money, obviously used the language in its popular and ordinary signification. All persons understand the term purchase-money to mean the price agreed to be paid for the land, or the debt created by the purchase. It is not understood to mean a debt due to any other person than the vendor, even though such money may have been applied by the borrower to the purchase of the land. The statute applies only to parties who stand in the relation of vendor and vendee, and those representing them.”<sup>3</sup>

<sup>1</sup> *Austin v. Underwood*, 37 Ill. 438; *Magee v. Magee*, 51 Ill. 500.

<sup>2</sup> *Griffin v. Blanchard*, 17 Cal. 71; *Carr v. Caldwell*, 10 Cal. 384.

<sup>3</sup> *Eyster v. Hathaway*, 50 Ill. 521.

**§ 224. Purchase-money of outstanding title.**—If the husband purchase an outstanding title to the homestead, in order to secure the continued enjoyment of the right, it will be presumed to have been necessary ; but the presumption may be rebutted by the wife, upon showing that she or her husband owned the paramount title when the outstanding title was acquired ; and if the wife shall show that the real title was so held when the outstanding title was obtained, then the consideration agreed to be paid will not be regarded as purchase-money, so as to subject the land to payment. On the other hand, if the wife fail to show that the paramount title was already held by either herself or her husband, it will be considered that the money agreed to be paid for such subsequently acquired title is purchase-money.<sup>1</sup>

**§ 225. What will be held to be purchase-money.**—Where A owned a tract of land which he had mortgaged to B for \$1,400 : C wished to buy this tract from A for \$3,000, and another tract from B for \$1,600. It was arranged that A should convey his tract for \$3,000, less the mortgage, and that B should then convey both tracts to C for \$4,600 ; C to pay \$1,000 down, and give a mortgage for the balance.

It was held that this was a sale of the whole from B to C, and that the mortgage being given for part of the purchase-money, C could not claim a homestead in the tract of A to defeat the foreclosure.<sup>2</sup>

And when land was bought, and the purchaser indorsed the note of a third person to the vendor in payment, and transferred a mortgage to him securing the note of such third person : held, that this was no novation of the original contract, no change in the relation of the parties to each other as to deprive the vendor of his right to enforce the payment of the purchase-money by levy on the land under execution against the maker and indorser of the note. (The land had been set apart as a homestead by the purchaser.) The land being the consideration for the indorsement of the note, and for the

<sup>1</sup> *Cassell v. Ross*, 33 Ill. 244.

<sup>2</sup> *Weider v. Clark*, 27 Ill. 251.

mortgage, until they are paid the claim of the vendor for the purchase-money is superior to the homestead.<sup>1</sup>

Again, where A sold land to B, taking his note for the purchase-money secured by a mortgage on the land, which was duly recorded, and B sold a portion of the land to C, who paid a part of the purchase-money to B, and for the balance joined with B in a note to A, secured by a mortgage on the land of both B and C, A giving up the old mortgage, it was held that on foreclosure the *fi. fa.* may sell the land of C, notwithstanding C may have had the same set off as a homestead; whether the purchase-money debt of C to B was satisfied by novation is not material. The note and mortgage given by C to A was for the removal of an incumbrance from the land, and brought the land within the exception of the clause of the Constitution of 1868.<sup>2</sup>

**§ 226. Purchase-money, action at law on note, special execution.**—Where the vendor took a mortgage for the purchase-money of his vendee, who occupied the premises as a homestead, it was held that it was not a debt arising after the purchase of such homestead, and may therefore be subjected to satisfaction for the same; and the husband can give a valid mortgage to secure the purchase-money without the concurrence and signature of his wife. And if the vendor, instead of proceeding to foreclose his mortgage, brings an action at law on one of the notes secured by the mortgage, and gets judgment, the judgment is, as between him and his vendee, a lien on the mortgage premises from the date of recording of the mortgage; but before such judgment lien can relate back as to third persons, the property must be described in the same, and a special execution directed to issue.<sup>3</sup>

Of course, a subsequent homestead right does not affect the vendor's lien in any way.<sup>4</sup>

<sup>1</sup> *Lane v. Collier*, 46 Ga. 580.

<sup>2</sup> *Hawkes v. Hawkes*, 46 Ga. 204.

<sup>3</sup> *Christy v. Dyer*, 14 Iowa 438; *Redfield v. Hart*, 12 Iowa 355; *Lassen v. Vance*, see 8 Cal. 271; *Cole v. Gill*, 14 Iowa 527; *Burnap v. Cook*, 16 Iowa 149; *Barnes v. Gay*, 7 Iowa 26; *Pratt v. Delavan*, 17 Iowa 307.

<sup>4</sup> *Id.* 7 Iowa 26.



**§ 227. What is not purchase-money—Definition of vendors.**—In Pennsylvania, it is held that where a person who advances money to the purchaser to pay the vendor for realty sold, does not stand in the place of the vendor so far as regards a lien for the money advanced. “Manifestly he is a loan creditor, and nothing more.” Therefore, it was held that a widow was entitled to her exemption as against such loan creditor. “The possessors of vendor’s liens are a well defined class of creditors. They are those who have parted with their lands in consideration of the price agreed to be paid, and to give any part of that to the widow of the purchaser would be to endow her out of the vendor’s property, instead of her husband’s. But a man who lends money to pay the purchase price of land is by no means a vendor, nor can he have a vendor’s lien on the land.”<sup>1</sup>

**§ 228. Vendor’s lien, where there is waiver of exemption in Pennsylvania.**—The effect of a waiver of the exemption on the part of the debtor in Pennsylvania, seems to work a great hardship on the vendor in some cases. It is said that when the exemption under the act is claimed by the debtor, no creditors, except creditors for unpaid purchase-money, can levy on the exempt property ; but where the exemption is not claimed, or having once been claimed, has been waived, purchase-money liens rank with all other liens, that is, according to their date of docketing. The claim for exemption is a personal privilege, and the debtor has a right to withdraw it, even though a withdrawal of the exemption claim will give the fund to the first judgment creditors in preference to the holder of the vendor’s lien.<sup>2</sup>

**§ 229. Purchase-money under the Rev. Code of Mississippi.**—Art. 284, p. 530, provides that “no property is exempt when the purchase-money forms, in whole or in part, the debt on which the judgment is founded,” but such judgment must be against the purchaser ; and if against his executrix

<sup>1</sup> Notte’s Appeal, 45 Penn. St. (9 Wright) 361.

<sup>2</sup> Kyle & Dunlap’s Appeal, 45 Penn. St. (9 Wright) 353.



only when the property purchased is real estate, it cannot be enforced under the statute by the sale of the property.<sup>1</sup>

**§ 230. Cases wherein homestead paramount to vendor's lien.**—In a case arising in Georgia, where A sold land to B, taking his notes for the purchase-money, giving bond for titles, and afterwards indorsed one of the notes to C, who indorsed it to D, and B, having paid some of the purchase-money, abandoned the land, and A having died, his administrator took possession of the land. Held, that the indorser and minor children of A are entitled to a homestead in the land as against a judgment obtained by D on the indorsed note against B as principal, and A and C as indorsers. The equity of B, under his bond for title with some of the purchase-money paid, to pay the purchase-money and demand title, does not, in such case, make the lien of the judgment paramount to the homestead.<sup>2</sup>

Under the code of Georgia, in force in 1864, it would appear that the homestead was not subject to sale, even for the purchase price of the land.

In the case of *Rushin v. Gance*,<sup>3</sup> it is said that the homestead and exemption provision of the code, in the exemption law of the State of Georgia, referred to in the Bankrupt Act of the United States, March 2d, 1867, which vests in the bankrupt, free from his debts, whatever property the State exempted from levy and sale under laws in force in the year 1864; and as, by the code, said homestead is not subject to levy and sale for the purchase-money, a judgment-creditor of a discharged bankrupt, though he obtained his judgment before the bankrupt's discharge, cannot levy upon and sell the homestead of the bankrupt set apart by the bankruptcy officials, even though said judgment be for the purchase-money of the homestead.

**§ 231. Assignment and transfer of vendor's lien.**—Some difference of opinion exists as to whether the lien of the vendor passes by the mere transfer of the note or bond

<sup>1</sup> *Buckingham v. Nelson*, 42 Miss. 417.

<sup>2</sup> *Faircloth v. St. John*, 44 Ga. 603.

<sup>3</sup> 41 Ga. 180.

given for the purchase-money. In *Pinchain v. Collard*,<sup>1</sup> the Court say, in discussing this subject: "Mr. Dart, in his treatise on vendors, says that the lien is assignable by parol, and refers to *Dryden v. Frost*,<sup>2</sup> which fully sustains the conclusion drawn by the author. But in that case there were some peculiar circumstances. The vendor not only agreed that the plaintiff should receive the sum from the purchaser, but the purchaser also agreed to pay it to the plaintiff, that is, he gave him his promissory note for the amount. Many authorities might be cited in support of the position that an assignment of the note for the purchase-money transfers, also, the vendor's lien. Among these may be cited *Parker v. Kelly*, (10 Smed. & M. 184), *Tamer v. Hicks*, (4 Id. 300), (6 Id. 490), *Meigs R. 52*, 4 Litt. R. 289, 5 Monroe 287, 18 Ala. 371.

"In opposition to this view, and that such transactions do not pass the vendor's lien, may be cited 9 Ga. 86, 10 Hemp. 371, 1 Bland. Chan. 519, 1 Paige R. 502."

The Court, however, expressed no opinion on the point.<sup>3</sup>

**§ 232. Fraud in the acquisition and disposition of the homestead.**—Some diversity of opinion exists in several of the States, in relation to the effect of fraud in the conveyance and acquisition of the homestead, as affecting creditors and their rights.

**§ 233. What is not a fraud on creditors.**—It is said that it is not a fraud on creditors for a debtor, even in insolvent circumstances, to buy a homestead which will be beyond their reach, with money which would otherwise be applied towards the payment of his debts. So the removal of a lien from the homestead is an act lawful in itself, although a defendant, being indebted in a sum of money which was secured by a mortgage on his homestead, and afterwards be-

<sup>1</sup> 13 Texas 333. In California, and many other States, it is uniformly held, that the mere indorsement of the notes carries with it the mortgages without any further assignment. *Hurt v. Wilson*, 38 Cal. 263.

<sup>2</sup> 3 Myl & C., 670.

<sup>3</sup> See *Chambliss v. Phelps*, 39 Ga. 386, where it is held that the fact of the debt being transferred to a person does not change the liability of the land for such purchase price.

coming insolvent, and after several attachments had been issued in suits against him, and levied upon his place of business, takes the money which he has, and pays off the debt secured by mortgage. It was held that this action was not an act to hinder, delay, and defraud his creditors.<sup>1</sup>

Nor will an insolvent debtor be deprived of the benefit of the homestead exemption, where he purchases property with his own money, merely because he procures the legal title to be vested in his wife, if his intention was, when he purchased, to hold the property as and for a homestead. But it would be otherwise, if, in taking the title to his wife, his design was simply to acquire property which he could hold in fraud of his creditors. The intention must be manifest that the premises were intended for a homestead.<sup>2</sup> Any fraudulent attempt to defeat the homestead right will be frustrated by the Courts, even in the husband's lifetime, against all fraudulent schemes to defeat it.<sup>3</sup>

**§ 234. A conveyance by a debtor of his homestead is not fraudulent, as to creditors.**—And where in such a case the grantee was the debtor's mother, he having purchased the premises with her money, and she having taken the conveyance in satisfaction of his indebtedness to her, it was further held that she was a bona fide purchaser for value.<sup>4</sup>

So, where a husband and wife conveyed a farm to their daughter, and subsequently the husband was declared a bankrupt, on a bill filed by his assignee, the deed was declared fraudulent and void as to creditors. The husband and wife then claimed a part of the farm as their homestead. The bankruptcy Court, without deciding this claim, ordered the land sold, subject to any legal claim of the bankrupt, a purchaser having brought ejectment for the part claimed and oc-

<sup>1</sup> In re Henkel, 2 Sawyer, C. C. 305; Campbell v. McManus, 32 Texas 442; Randall v. Buffington, 10 Cal. 493; Culver v. Rogers, 28 Cal. 526; McManus v. Campbell, 37 Texas 267.

<sup>2</sup> Cipperly v. Rhodes, 53 Ill. 346.

<sup>3</sup> Still v. Saunders, 8 Cal. 286.

<sup>4</sup> Hibben v. Soyer, 33 Wis. 319; Bartholomew v. West, 2 Dill. 293; Bix v. Capitol Bank, 2 Dill. C. C. 369; Cox v. Wilder, 2 Dill. C. C. 45; Perry v. Taylor, 10 Bank. Reg. 203.

cupied as a homestead. It was held that the purchaser was not entitled to recover. The deed being set aside, the title reverted to the bankrupt, and then passed to his assignee, subject to the exemptions of the bankrupt act.<sup>1</sup>

A grantor who makes a conveyance of his land which is fraudulent as to his creditors, does not thereby forfeit his right to a homestead as to such creditors. They can sell, under an execution, only the remaining part of his land, leaving the homestead to be contested between the alleged fraudulent grantor and grantee,<sup>2</sup> and where a conveyance, made by a debtor, has been set aside as a fraud upon the rights of his creditors, the creditors cannot, under an execution issued under the decree in the case, set up the fraudulent conveyance against which they claim, as a bar to the debtor's assertion of his right to have a family homestead exempted from sale on execution.<sup>3</sup>

**§ 235. Fraudulent acts of owner of which the law will not permit a denial.**—In the case of *Welch v. Rice*,<sup>4</sup> the Court says, in speaking of homestead claimants, "owners can do some acts which the policy of the law will not permit them to gainsay or deny." If "a married woman, evidently free from all constraint, and with a full knowledge of her rights, should represent that a certain tract of land was not her homestead, and then cause a person to purchase it, she would be concluded by her acts; but if the party purchasing should know all the facts, or by reasonable diligence could know, and it should be apparent that the married woman was not entirely free from restraint, or was not cognizant of her rights, whatever admissions might be made under these or similar circumstances could not, with any propriety, be said to influence the purchaser, or to estop the married woman from asserting her rights. These admissions, whether of law

<sup>1</sup> *McFarland v. Goodman*, Circuit Court U. S., East. Dist., Wis.; *Law Register*, Nov. '74, p. 697; *In re Pratt*, *Pacific L. Rep.*, Jan. 23d, '74; *Smith v. Kerr*, 2 *Dillon* 63; *In re Detrick*, 14 *Am. L. Reg.* 166; *Volger v. Montgomery*, 13 *Am. L. Reg.* 244.

<sup>2</sup> *Crummen v. Bennett*, 68 *N. C.* 494.

<sup>3</sup> *Sears v. Hanks*, 14 *Ohio* 298.

<sup>4</sup> 31 *Texas* 688.

or of fact, which have been acted on by others, and which were calculated to influence a prudent man, and which were the cause of another's actions, and which were deliberately and knowingly made, are conclusive against the party making them, in all cases between him and her, and the person whose conduct was thus influenced."

**§ 236. The English doctrine in regard to conveyances in fraud of creditors** is, that in order to make even a voluntary conveyance, without consideration, void as to creditors existing or subsequent, it is indispensable that it should transfer property which would be liable to be taken in execution for the payment of debts. Clearly this principle applies to the conveyance of homesteads, which have a paramount enduring exemption from all debts; and the conveyance of the homestead premises for a valuable consideration, or even for no consideration, cannot be deemed a conveyance to defraud creditors.<sup>1</sup>

**§ 237. Exemption not an incumbrance, claim, or lien—Fraudulent representation.**—The exemption of real estate from sale on execution is not an "incumbrance, claim, or lien" on the land. The householder was none the less the owner because of the exemption of the entire estate in the premises. His power of disposition thereof is not thereby in any degree impaired. So, where a man applied for credit, and represented that there was no incumbrance, claim, or lien on his property, with the exception of a small mortgage, (though he had recorded his property as a homestead), it was held that he had not committed such fraud as would estop him from claiming the exemption of the premises from sale under an execution issued for the debt contracted on the faith of his representations in regard to his property.<sup>2</sup>

**§ 238. Deed, intent to delay and defraud creditors.**—But a deed made with intent to hinder, delay, and defraud creditors is valid as to every person but those intended to be

<sup>1</sup> See *Wood v. Chambers*, 20 Texas 247; *Martel v. Somers*, 26 Texas 551.

<sup>2</sup> *Robinson v. Willy*, 19 Barb. 157.

defrauded thereby ; and the grantor in such deed can have no homestead right in the premises conveyed.<sup>1</sup>

So, in Pennsylvania, it is held under their \$300 exemption law, that a conveyance of real estate in fraud of creditors estops a debtor from demanding \$300 worth of the proceeds of a sheriff's sale, a principle which applies itself with equal force to transfers of personal property in fraud of creditors, or the concealment thereof.<sup>2</sup>

<sup>1</sup> *Piper v. Johnston*, 12 Minn. 60.

<sup>2</sup> *Deiffenderfer v. Fisher*, 3 Grant's Cases 30 ; *Edwards v. Mahon*, 5 Phila. R. 531 ; *Strouse's Ex. v. Becker*, 38 Penn. St. 190 ; *Emerson v. Smith*, 51 Penn. St. 90 ; *Freeman v. Smith*, 6 Casey 264 ; *McCarthy's Appeal*, 68 Penn. St. 217 ; *Huey's Appeal*, 29 Penn. St. 219 ; *Smith v. Emerson*, 43 Penn. St. 465.

The weight of authority in the recent decisions of the U. S. Courts are against these rules. See Secs. 468-471, and 489, Bankruptcy Chapter.

## CHAPTER IX.

## HOW DIVESTED.

1. ALIENATION, CONVEYANCE.
  - A. By both Spouses.
2. BY CONTRACT TO CONVEY.
3. BY MORTGAGE, DEED OF TRUST.
4. BY ABANDONMENT.
5. BY WAIVER.

## BY CONVEYANCE.

**§ 239. Former rule relating to the effect of alienation by husband alone.**—Formerly the view obtained, and it still obtains in a few of the States, that the occupancy of a piece of land as a homestead merely suspended the operation of any alienation, incumbrance, or liens concerning it, during the time it was so occupied as a homestead ; for instance, that every deed, mortgage, or other conveyance of the homestead by the husband alone, and every lien or incumbrance obtained through his act, or against him alone, is as effectual and binding on the homestead as it would be on any other land, except that its operation is merely suspended while it is so occupied as a homestead ; and that as soon as the land ceases to be occupied as a homestead, such deed, mortgage, lien, or incumbrance then comes into instant and effective operation, or in other words, that the husband alone, by his own act, could alienate his homestead as fully and completely as he could any other land, by a deed, mortgage, or other conveyance thereof, or by allowing a decree of Court to go against him for it, or by allowing a judgment lien to attach thereto, except, however, that such alienation is subject only

to the contingency of his continuing to occupy the land as a homestead.<sup>1</sup>

**§ 240. The more recent view**, and the one which seems most consonant with the object to be attained, namely, the protection of the family against the improvidence or misfortune of its head, is that no incumbrance or lien can ever attach to or affect the homestead, except such as are specifically mentioned in the enactment, constitutional or statutory, creating the exemption. In general, there are liens for the purchase-money, vendors', mechanics', and laborers' liens, and mortgages lawfully obtained, with the written consent of the wife, and the lien of taxes. No alienation by the husband alone, in whatever way it may be attempted to be effected, is of any validity. Nothing that he alone can do, or suffer to be done, can cast the slightest cloud on the title to the homestead—it remains absolutely free from all liens, deeds, or incumbrances, except those above mentioned. This latter view has now, in nearly every State, superseded the former, mostly through statutory regulations.<sup>2</sup>

<sup>1</sup> *Gee v. Moore*, 14 Cal. 472; *Bowman v. Norton*, 16 Cal. 213; *Atkinson v. Atkinson*, 37 N. H. 434; *Silloway v. Brown*, 12 Allen 30; *West v. Ward*, 26 Wis. 579; *Simmons v. Johnson*, 14 Wis. 523; *Hoyt v. Howe*, 3 Wis. 753; *Trustees, etc., v. Schell*, 17 Wis. 308; *Lawton v. Bruce*, 39 Maine 488; *Whitworth v. Lyons*, 39 Miss. 467; changed by statute in Miss.; in Wis. changed by statute of 1858; *McQuade v. Whaling*, 31 Cal. 526; *Guiod v. Guiod*, 14 Cal. 506; *Sampson v. Williams*, 6 Texas 109; *Brown v. Coon*, 36 Ill. 243; *McDonald v. Crandall*, 43 Ill. 231; *Morris v. Seargent*, 18 Iowa 90; *Hait v. Haule*, 19 Wis. 472; *Smith v. Provin*, 4 Allen 516; *Allen v. Cook*, 26 Barb. 374; *Chamberlin v. Lyell*, 3 Mich. 448; *Herschfeldt v. George*, 6 Mich. 456; *Folsom v. Carli*, 5 Minn. 333; *Parker v. Dean*, 45 Miss. 420.

<sup>2</sup> *Deffeliz v. Pico*, 46 Cal. 289; *Lies v. Diablar*, 12 Cal. 327; *Pool v. Gerrard*, 6 Cal. 71; *Revalk v. Kraemer*, 8 Cal. 66; *Dorsey v. McFarland*, 7 Cal. 342; *Sears v. Dixon*, 33 Cal. 326; *Lord v. Morris*, 18 Cal. 482; *Barber v. Babel*, 36 Cal. 11; *Lent v. Morrill*, 25 Cal. 499; *Engelbrecht v. Shade*, 47 Cal. 627; *Lloyd v. Frank*, 30 Wis. 306; *Williams v. Williams*, S. C. Tenn., April, 1874; *Lamb v. Shay*, 14 Iowa 567; *Dye v. Mann*, 10 Mich. 291; *Larson v. Reynolds*, 18 Iowa 579; *Clark v. Shannon*, 1 Nev. 568; *Olson v. Neilson*, 3 Minn. 53; *Thorn v. Darlington*, 6 Bush 448; *Lee v. Kingsbury*, 13 Texas 71; *Dollman v. Harris*, 5 Kansas 597; *Stewart v. McKay*, 16 Texas 58; *Morris v. Ward*, 5 Kansas 239; *Rogers v. Renshaw*, 37 Texas 625; *Green v. Marks*, 25 Ill. 221; *McManus v. Campbell*, 37 Texas 267; *Bonnell v. Smith*, 53 Ill. 377; *Conklin v. Foster*, 57 Ill. 104; *Parker v. Dean*, 45 Miss. 409, changed by statute of 1867 and 1870; *Statutes of Wisconsin*, 1858.



**§ 241. The natural right of alienation not inhibited.**—The homestead is exempt from forced sale, but its voluntary alienation is not inhibited. The right of disposition, certainly one of the most valuable incidents of ownership, is restricted only by the necessity, if the head of the family be married, of obtaining the consent of the wife in the form prescribed by law, and the owner having the legal, and it has been frequently termed the natural right of disposing of his property, can exercise all such powers over the subject-matter as are not inconsistent with the plain and obvious intent of the law.<sup>1</sup>

**§ 242. Alienation of the homestead by conveyance.**—Premises which have been dedicated as a homestead can only be divested of that character by the joint deed, or act, of the husband and wife.<sup>2</sup> Any conveyance purporting to convey the homestead property must comply with the letter of the statute.<sup>3</sup> As a general rule, the statutes require the joint deed of both husband and wife. The husband must make the contract and the wife must assent to it, therefore the separate deeds of husband and wife are invalid.<sup>4</sup> A conveyance by the husband alone is an absolute nullity while the premises

<sup>1</sup> *Sampson v. Williamson*, 6 Texas 109.

<sup>2</sup> *Taylor v. Hargous*, 4 Cal. 273; *Hait v. Haule*, 19 Wis. 472; *Gee v. Moore*, 14 Cal. 475; *Williams v. Star*, 5 Wis. 534; *Sargent v. Wilson*, 5 Cal. 504; *Goldman v. Clark*, 1 Nev. 607; *Lies v. Diablar*, 12 Cal. 327; *Lee v. Kingsbury*, 13 Texas 71; *Patterson v. Kreig*, 29 Ill. 514; *Rogers v. Renshaw*, 37 Texas 625; *Boyd v. Cudderback*, 31 Ill. 113; *Morris v. Seargent*, 18 Iowa 90; *Alley v. Bay*, 9 Iowa 509; *Burnside v. Terry*, 45 Ga. 621; *Simpson v. Robert*, 35 Ga. 180; *Atkinson v. Atkinson*, 37 N. H. 434; *Horn v. Tuft*, 39 N. H. 478; *Davis v. Andrews*, 30 Vt. 678; *Greenough v. Turner*, 11 Grey 332; *Jenney v. Grey*, 5 Ohio Stat. 45; *Rev. Stat. N. Y.* (1850) 615; *Olsen v. Nelson*, 3 Minn. 53; *Lawrer v. Slingerland*, 11 Minn. 447; *Sharp v. Baily*, 14 Iowa 387; *Yost v. Devault*, 9 Iowa 60; *Riehl v. Bingenheimer*, 28 Wis. 84; *Fisher v. Meister*, 24 Mich. 447; *Ring v. Burt*, 17 Mich. 465; *Williams v. Williams*, S. C. Tenn., Apl. Term, 1874; *How v. Adams*, 28 Vt. 541; *Connor v. McMurry*, 2 Allen 202; *Thorn v. Darlington*, 6 Bush 448.

<sup>3</sup> *Lies v. Diablar*, 12 Cal. 327; *Young v. Van Benthuyssen*, 30 Texas 763; *Hamblin v. Warnecke*, 31 Texas 91.

<sup>4</sup> *Pool v. Gerrard*, 6 Cal. 71; see *Luther v. Drake*, 21 Iowa 92; *Dorsey v. McFarland*, 7 Cal. 342; *How v. Adams*, 28 Vt. 544; *Van Reynegan v. Revalk*, 8 Cal. 75.

continue impressed with the homestead character.<sup>1</sup> And even if the husband and wife gave up possession of the homestead to the purchaser under such a conveyance they would not be estopped thereby from bringing ejectment against him to recover possession of the homestead.<sup>2</sup> So, if after a conveyance by the husband alone, the husband and wife were to join in a valid conveyance, in the mode prescribed by law, to a third person, the vendee of the husband and wife would succeed to all their right, title, and interest in the homestead, notwithstanding the prior conveyance to the vendee of the husband.<sup>3</sup> While, in New Hampshire, it is requisite that the wife should join in the act of alienation, yet, if the husband conveys the homestead without the concurrence of the wife, the grantee takes it subject to the homestead right of the wife, till such time as the husband acquires a new homestead, which, though of less value than the former, terminates the right.<sup>4</sup> So in the case of *Horn v. Tufts*,<sup>4</sup> it is held that if a husband conveys an undivided half of the homestead on which he and his family have lived, to a third person, and his wife does not join in the deed, but the grantee enters into possession of his part and the husband continues to occupy the residue in common as his homestead, the homestead right becomes limited to the half so occupied. In that State the homestead does not become assignable until the homestead has been set out by metes and bounds.<sup>5</sup>

<sup>1</sup> Except in the State of Mississippi, see *Thoms v. Thoms*, 45 Miss. 243.

<sup>2</sup> *Taylor v. Hargous*, 4 Cal. 268; *Dorsey v. McFarland*, 7 Cal. 345; *White v. Clark*, 36 Ill. 285; *Boyd v. Cuddeback*, 31 Ill. 113; see *McDonald v. Crandall*, 43 Ill. 232.

<sup>3</sup> *Lee v. Kingsbury*, 13 Texas 71; *Sampson v. Williamson*, 6 Texas 109; *Stewart v. McKey*, 16 Texas 58; *Rogers v. Renshaw*, 37 Texas 625; see *Young v. Van Benthuyssen*, 30 Texas 763; *Hamblin v. Warnecke*, 31 Texas 91; *Alley v. Bay*, 9 Iowa 509; *Yost v. Devault*, 9 Iowa 60; *Williams v. Sweetland*, 10 Iowa 51; *Doyle v. Coburn*, 6 Allen 72; *Gee v. Moore*, 14 Cal. 472; *Drury v. Bachelder*, 11 Grey 214; *Bowman v. Norton*, 16 Cal. 213.

<sup>4</sup> *Atkinson v. Atkinson*, 37 N. H. 434; *Gunnison v. Twitchell*, 38 N. H. 62; *Horn v. Tufts*, 39 N. H. 478; see *Davis v. Andrews*, 30 Vt. 678; *How v. Adams*, 28 Vt. 541; *Sargent v. Wilson*, 5 Cal. 504. Compare *Richards v. Chace*, 2 Gray 283; *Williams v. Starr*, 5 Wis. 534; *Yost v. Devault*, 9 Iowa 60; *Alley v. Bay*, 9 Iowa 509; *Jenny v. Grey*, 5 Ohio St. R. 45.

<sup>5</sup> *Gunnison v. Twitchell*, 38 N. H. 62; *Bennett v. Cutter*, 44 N. H. 69; *Atkinson v. Atkinson*, 37 N. H. 434.

So, in Massachusetts, it is held that where a householder, with a homestead estate in his land, has alienated such land, but without relinquishing his right of homestead, the grantee is the general owner, entitled to the whole, except so far as his grantor's special title may exclude him; and until his homestead has been set out to the grantor, he and the owner of the residue are in the relation to each other of tenants in common.<sup>1</sup> We have seen in the California cases, cited in this section, that any conveyance or mortgage of the homestead premises by the husband alone was absolutely void if the homestead was of less than the statutory value, and was void to the extent of that value, if they were worth more. Afterwards, in a series of decisions by Field, C. J., it was held that the title in the homestead continued and remained in the husband, and that a conveyance or mortgage by him alone was valid, but valid, subject to the right of the husband and his family to remain in possession of the premises so long as it remained their homestead, but that the husband had the power at any time, by removal, to terminate their homestead.<sup>2</sup> In the case of *Gee v. Moore*, it was held that a sale of the homestead premises by the husband alone vested the estate in the vendee, subject only to the right of the family to remain in possession until another homestead was acquired, or the character of the premises as a homestead was otherwise gone; and upon the death of the wife without issue living, or by the abandonment of the premises by the husband, the property ceased to be homestead, and the vendee of the husband was immediately entitled to the possession. But in 1860 an amendment to the homestead law was passed, by which the homestead estate was vested in the husband and wife as joint tenants, thus making the husband's single deed to convey the property invalid; and in 1862 another amendatory act was passed, which provided (Sec. 2) that: "No alienation, sale, conveyance,

<sup>1</sup> *Silloway v. Brown*, 12 Allen 30.

<sup>2</sup> *Gee v. Moore*, 14 Cal. 472; *Guiod v. Guiod*, 14 Cal. 506; *Bowman v. Norton*, 16 Cal. 213; as to the question of removal, and the domicile of the husband and domicile of the wife, see *Am. Lead. Cases*, vol. 1, 737; *Lacy v. Clemens*, 36 Texas 661; *Meyer v. Claus*, 15 Texas 516; *Earl v. Earl*, 9 Texas 634; *Story Conflict of Laws*, 45; *Johnson v. Smith*, 21 Texas 726; *The Republic v. Young*, Dallum 464; *Russell v. Randolph*, 11 Texas 460; *State v. Skidmore*, 5 Texas 469.

mortgage, or other lien of or upon the homestead property shall be valid or effectual for any purpose whatever, unless the same be executed and acknowledged by his wife, if the owner be married, and the wife be a resident of the State, in the same manner as provided by law in the case of the conveyance by her of her separate and real property."

So, in Illinois, under the amendment of the Homestead Act of 1857, it was held, that where the owner of a homestead, residing upon it with his family, since the passage of the foregoing amendment, executed a deed of conveyance therefor, but did not relinquish the homestead exemption, such a conveyance operates to pass the fee, but suspends its operation until the grantor abandons the premises, or surrenders possession to the grantee. But where a party conveys the homestead, and the exemption is not relinquished in the mode prescribed by law, the grantee does not acquire such a title as will authorize a recovery in ejectment, or enable him to defend against his grantor, still remaining in possession in an action of trespass on the premises.<sup>1</sup>

In California, the right of homestead had attached to certain premises; the husband subsequently became insane, and a guardian, appointed to take charge of his affairs, petitioned the Court making the appointment for an order to sell the homestead, which order was granted, and the property sold under direction of the Court, the wife not joining in the deed of sale. It was held that such sale was invalid, though the wife knew of the proceedings, and received part of the proceeds of the sale, she not having joined in the conveyance; the guardian having no greater right or authority than the ward would have had, had no disability existed on the part of the husband.<sup>2</sup>

But in Massachusetts, under a somewhat similar statute, the Court of that State held that the law did not exempt the homestead from sale by the guardian of the owner, for payment of his debts, and for his support.<sup>3</sup>

<sup>1</sup> McDonald v. Crandall, 43 Ill. 232; Hewitt v. Templeton, 48 Ill. 367.

<sup>2</sup> Fledge v. Garvey, 47 Cal. 371.

<sup>3</sup> Wilber v. Hickey, 8 Gray 432. See Chapter Descent and Probate, for fuller statement of these cases.

**§ 243. Acknowledgment of wife in alienations of the homestead.**—In many of the States, it is absolutely essential, in order to make a valid conveyance of the homestead, that the wife acknowledge the deed separate and apart from her husband, and the acknowledging officer is bound to certify that he made her acquainted with the contents of the instrument, and that she signed and acknowledged it freely and of her own volition.<sup>1</sup>

**§ 244. Special release of the homestead estate requisite,** in some of the States. In order that the deed shall pass the homestead right of the grantors, it must contain a special release of the right in express terms. Where the homestead is not specifically named as conveyed, no general language in the deed, though it comprehend “every claim, interest, or estate, of whatever description at law or in equity,” will pass the right or estop the householder from asserting it against any one claiming under the deed.<sup>2</sup> And in some few of the States, the wife must join in the granting part of the deed, and her name must appear in the *in testimonium* part thereof.<sup>3</sup>

**§ 245. Not essential to state that it is the homestead that is intended to be conveyed.**—While in some few of the States it is necessary to relinquish the homestead in express terms, in others it is not essential to the validity of a conveyance, mortgage, or deed of trust of the homestead, that the grantors state explicitly that it is the homestead

<sup>1</sup> *Young v. Van Benthuyssen*, 30 Texas 763; *Goldman v. Clark*, 1 Nev. 607; *Clark v. Shannon*, 1 Nev. 568; *Burnside v. Terry*, 45 Ga. 621; Code of Tenn. 2114; *Williams v. Williams*, Sup. Ct. Tenn., April, 1874; *Myers* Sup. (Ky.) 714; 6 Bush (Ky.) 448; *Pascal's Digest*, Texas, Art. 1003; *Sargent v. Wilson*, 5 Cal. 505; Codes of Cal., Secs. 1186 and 1191; *Lees v. Diablar*, 12 Cal. 327; *Fisher v. Meister*, 24 Mich. 447; Rev. Stat. N. Y. 615; Act of 1850; *How v. Adams*, 28 Vt. 543; *Hait v. Haule*, 19 Wis. 472; *Olsen v. Nelson*, 3 Minn. 53, changed in Minn. by statute of 1860 and 1866; see *Lawler v. Slingerland*, 11 Minn. 447.

<sup>2</sup> *Miller v. Marckle*, 27 Ill. 405; *Sharp v. Baily*, 14 Iowa 387; *Pardee v. Lindley*, 31 Ill. 187; *Larsen v. Reynolds*, 13 Iowa 579; *Patterson v. Kreig*, 29 Ill. 514; *Greenough v. Turner*, 11 Grey 332; *Vanzant v. Vanzant*, 23 Ill. 540; *Drury v. Bachelder*, 11 Grey 214; *Doyle v. Coburn*, 6 Allen 72; *Silloway v. Brown*, 12 Allen 30; *Adams v. Jenkins*, 16 Grey 146.

<sup>3</sup> *Sharp v. Baily*, 14 Iowa 387.

which they wish to convey or incumber, for the very obvious reason that "the grantors interested in the property are presumed to know what they are granting when they use expressions which accurately describe the property."<sup>1</sup>

**§ 246. Husband's right to arrange prior equities.—** The restriction on the power of the husband to dispose of his homestead without the wife's consent, applies only where the husband has acquired full property in the land, and not where it is charged with preceding equities or incumbrances. These must be discharged, because they have precedence over the rights of the homestead privilege; and the right of the husband to make arrangements in relation to the incumbrance, or to renounce the lands thus burdened or subject to conditions and contingencies, cannot be questioned by the wife, in virtue of her remote right, which might arise if the incumbrances or conditions were ever discharged or removed—unless in cases where the husband is squandering the property with a fraudulent design of depriving his wife of a homestead.<sup>2</sup>

**§ 247. Surplus over statutory value or quantity.—** While the general rule is that a grant of the homestead by the husband alone is void, where the premises do not exceed the statutory value or quantity, it is not void as to the surplus in value or quantity. The general rule is that where a grant is declared void, only that part which conflicts with the statute is void, and the instrument is good itself as to those portions which do not conflict with the statute;<sup>3</sup> therefore, a sale or alienation of the homestead by the husband alone, without the signature of the wife, is void only as to the statutory value of the homestead. Any excess over that value is subject to the control of the husband, and may be disposed of by him in any manner he thinks fit. But where the ex-

<sup>1</sup> *Pfeiffer v. Reihn*, 13 Cal. 643; *Babcock v. Hoey*, 11 Iowa 375; *O'Brien v. Young*, 15 Iowa 5.

<sup>2</sup> *White v. Shepherd*, 16 Texas 163; *Tunstel v. Jones*, 25 Ark. 372; *Cassell v. Ross*, 33 Ill. 245; *Hawkes v. Hawkes*, 46 Ga. 204; *Christy v. Dyer*, 14 Iowa 438; *Lassen v. Vance*, 8 Cal. 271.

<sup>3</sup> *People v. Burbank*, 12 Cal. 378; 1 Blk. Com. 87; *French v. Teschemaker*, 24 Cal. 518.

cess is sold, the interest conveyed must be defined and certain, otherwise the purchaser will be unable to show any title to any particular part of the premises of which a Court could take notice.<sup>1</sup> In Michigan, however, it was held that a conveyance by a husband of an estate in which he has a homestead without joinder of the wife, is void as to the entire estate, and not only to the extent of the homestead interest.<sup>2</sup>

**§ 248. Deed of husband alone to lands held in joint or common tenancy.**—There is nothing to prevent the owner of an undivided interest in land held in joint tenancy or tenancy in common, from conveying it without the concurrence and signature of his wife, even though he and his wife have been residing on the land and using it as their homestead, in those States such as California, Indiana, Massachusetts, New Hampshire, Wisconsin, and some others, wherein the right of homestead is denied in lands so held.<sup>3</sup>

**§ 249. Conveyance by the husband and wife of an undivided interest destroys the right of homestead** in those States where the right is denied in lands held in common. The reason assigned being, that as a husband and wife could, by joining in a conveyance, destroy the homestead right already acquired by selling the whole of the homestead property, so they could destroy the homestead right by selling an undivided portion thereof, and thereafter the residue would be subject to the disposition of the husband alone.<sup>4</sup>

<sup>1</sup> Gary v. Eastabrook, 6 Cal. 457; Atkinson v. Atkinson, 37 N. H. 434; Gunnison v. Twitchell, 38 N. H. 62; Stewart v. Mackey, 16 Texas 57; Rogers v. Renshaw, 37 Texas 625; Smith v. Provin, 4 Allen 516; Thorn v. Darlington, (Ky.) 6 Bush 448; Dye v. Mann, 10 Mich. 291; Booker v. Anderson, 35 Ill. 67; Boyd v. Cudderworth, 31 Ill. 113; Swan v. Stevens, 99 Mass. 9; Sargent v. Wilson, 5 Cal. 504; Lies v. Diablar, 12 Cal. 327; Horn v. Tufts, 39 N. H. 478; Davis v. Andrews, 30 Vt. 678; How v. Adams, 28 Vt. 541; Clark v. Shannon, 1 Nev. 568; Green v. Marks, 25 Ill. 221; Bliss v. Clark, 39 Ill. 590; Brown v. Coon, 36 Ill. 248; Luther v. Drake, 21 Iowa 92; Hait v. Haule, 19 Wis. 472.

<sup>2</sup> Dye v. Mann, 10 Mich. 291.

<sup>3</sup> West v. Ward, 26 Wis. 579; Thurston v. Maddock, 6 Allen 427; Parker v. Dean, 45 Miss. 409; Kellersberger v. Kopp, 6 Cal. 563; Wolf v. Fleischacker, 5 Cal. 244; Giblin v. Jordan, 6 Cal. 416; Elias v. Verdugo, 27 Cal. 418.

<sup>4</sup> Kellersberger v. Kopp, 6 Cal. 565; Parker v. Dean, 45 Miss. 409, 423. But



**§ 250. Alienation by husband alone of house on leased land.**—Where a man of family has been living in his own house, which is on leased ground, and using the premises as a homestead, he may, in Wisconsin, assign the lease and sell the house without the consent and signature of his wife.<sup>1</sup>

**§ 251. Conveyance of property by husband before selection.**—The owner of premises may convey the same without the signature of the wife, if such conveyance is made before selection of the premises as a homestead.<sup>2</sup>

**§ 252. Fraudulent procurement of wife's signature to husband's deed of homestead.**—A conveyance of the homestead, by the husband, for which he receives the consideration, but in which the wife does not join, or to which her name is signed by a third party without authority, is void, and will be set aside at the suit of the husband and wife. The rights of the wife, and those of the family, in the homestead, cannot be prejudiced or affected by the fraudulent acts or bad faith of the husband in the sale and conveyance thereof.<sup>3</sup> It has also been held, that the conveyance of the homestead by the husband is not valid as against his wife, although it appears he had signed his wife's name to the deed, and that he had been in the habit of so executing deeds with the acquiescence of the wife.<sup>4</sup>

**§ 253. The wife cannot sell her interest in the homestead to her husband.**—Such a pretended sale would be a sale to herself, and would be ineffectual for any purpose whatever.<sup>5</sup>

**§ 254. The husband can convey the homestead to a trustee for benefit of wife.**—A married man, owning a

see the better rule in the case of *Horn v. Tufts*, 39 N. H. 478, and *Silloway v. Brown*, 12 Allen 30.

<sup>1</sup> *Platto v. Cady*, 12 Wis. 461.

<sup>2</sup> *Wisner v. Farnham*, 2 Mich. 475.

<sup>3</sup> *Eli v. Gridley*, 27 Iowa 376. See distinction in *Brown v. Coon*, 36 Ill. 243.

<sup>4</sup> *Morris v. Seargent*, 18 Iowa 90.

<sup>5</sup> *Welch v. Rice*, 31 Texas 688.



homestead, is capable of conveying such homestead to a trustee for the benefit of his wife and children, without the signature of the wife being necessary to the validity of the conveyance—the trust being a passive trust. The deed would not be void for want of the wife's signature, not being an "alienation" of the homestead within the meaning of the law, and the trust being passive the trustee takes no title, but the estate vests immediately in the cestui que trust.<sup>1</sup> Besides, a right of homestead is not affected by even a fraudulent deed from the owner of the land to his wife, through the medium of a third person.<sup>2</sup> So, a conveyance of the homestead, by parents to their son, to induce him to live with them on the place, which they were to assist him in cultivating, being merely a means of applying the homestead more effectually to the maintenance of the grantors, held not to extinguish their rights under the homestead exemption law.<sup>3</sup>

**§. 255. In Mississippi, the husband alone can alienate the homestead,** without the consent or concurrence of the wife. The law provides that "every free white citizen of this State, male or female, being a householder and having a family, shall be entitled to hold exempt, etc., and such exemption shall continue after the death of such householder, for the benefit of the widow of said deceased."<sup>4</sup>

It was held that, in the absence of any restrictions in the statutes, it would seem "to follow that the title remains in the debtor, and his power of disposition is unembarrassed. There is no restriction in the statutes. The prominent idea is to exempt the homestead from creditors."<sup>5</sup>

#### BY CONTRACT TO CONVEY.

**§ 256. Contract to convey homestead executed by husband alone.**—As in most of the States a conveyance of

<sup>1</sup> Riehl v. Bengenheimer, 28 Wis. 84.

<sup>2</sup> Castle v. Palmer, 6 Allen 401.

<sup>3</sup> Murphy v. Crouch, 24 Wis. 365.

<sup>4</sup> Rev. Code, Art. 281, p. 529, Acts of 1865 and 1867.

<sup>5</sup> Thoms v. Thoms, 45 Miss. 263 and 274.

the homestead by the husband without the signature of the wife is of no validity, so an executory contract of the husband will not be enforced against the homestead.<sup>1</sup>

**§ 257. Bond to convey homestead, by husband alone, may be carried out after wife's death.**—If a bond be given by the husband alone in the wife's lifetime, he may make title after her death, because to do so is only to carry into effect a contract which he was fully empowered by law to make at the time of the execution of the bond. It is true that the husband is not at liberty to alienate the homestead during his wife's lifetime without her consent. But a bond executed by him in his wife's lifetime, conditioned that he will convey his homestead with a perfect title at a future time, will in contemplation of law be a valid instrument, binding upon the husband, and damages might be recovered against him for breach of it by suit upon the bond.<sup>2</sup>

**§ 258. Bond to compel wife to convey.**—Undoubtedly a bond to compel the wife to convey at a future time would be void, because it would be an undertaking to do an unlawful thing.<sup>3</sup> But a bond to make title at some future day to a certain tract of land, the same being the homestead of the obligor and his wife and children, would not be an unlawful undertaking. Such a contract might be entered into in the confident expectation that the wife would freely make the necessary conveyance; or it might be entered into with the intention to acquire another homestead before the time elapsed for the performance of the bond. It is true that, while the premises which the party might so undertake by his bond to convey remained the homestead of the obligor and his wife, the Courts would not decree specific performance of the bond. But if the wife should die before the time expired for the performance of the bond, or if before the expira-

<sup>1</sup> Except, perhaps, in Mississippi and one or two other States. See Sec. 240, Alienation of the homestead by conveyance, and Sec. 262, Mortgages.

<sup>2</sup> *Clarkin v. Lewis*, 20 Cal. 634; *Yost v. Devault*, 9 Iowa 60; *Berlin v. Burns*, 17 Texas 532.

<sup>3</sup> *Clarkin v. Lewis*, 20 Cal. 634; *Ward v. Terry*, 2 Douglas (Mich.) 344.

tion of that time the obligor and his wife should acquire another homestead, then the Courts might decree specific performance of the bond, because every legal obstacle to a specific performance would be removed.<sup>1</sup>

**§ 259. Specific performance not enforced, damages obtained.**—It has also been held in California, Michigan, and in Texas, that an executory contract or bond by a married man to convey the homestead premises will not be specifically enforced, but a contract by him to convey the homestead is not void, and damages may be recovered against him for its breach.<sup>2</sup> And a contract of a married man for the sale and conveyance of land, being the homestead premises of himself and wife, is not fulfilled by the tender of a conveyance executed by himself alone, as such conveyance would not pass the title.<sup>3</sup>

**§ 260. Contract to convey land executed before adoption as homestead, will prevent the homestead right from attaching.**—A contract by a married man to convey an undivided interest in the land, executed before any residence of his family and that of his covenantee on the premises, will prevent the homestead right from attaching. Therefore a deed executed by the husband alone after residence by the family, would be valid.<sup>4</sup>

The same principle is adopted in Iowa, where it is held that a subsequent adoption as a homestead of land previously agreed to be sold cannot release the party from his obligation to convey :<sup>5</sup> holding that the plea that the house is "now" a homestead, and that the wife refuses to join in the conveyance, is bad.<sup>6</sup>

<sup>1</sup> *Brewer v. Wall*, 23 Texas 585 ; *Allison v. Shilling*, 27 Texas 450 ; *Wright v. Hays*, 34 Texas 253 ; *Weed v. Terry*, 2 Douglas (Mich.) 344.

<sup>2</sup> *Weed v. Terry*, 2 Douglas (Mich.) 344 ; *Clarkin v. Lewis*, 20 Cal. 634 ; *Allison v. Shilling*, 27 Texas 450 ; on the question of damages, see *Yost v. Devault*, 9 Iowa 62 ; *Cross v. Evarta*, 28 Texas 524 ; *Brewer v. Wall*, 23 Texas 585 ; *Wright v. Hayes*, 34 Texas 253 ; *Ray v. Young*, 13 Texas 552 ; 4 Iowa 1.

<sup>3</sup> *Clarkin v. Lewis*, 20 Cal. 635.

<sup>4</sup> *Kellersberger v. Kopp*, 6 Cal. 563.

<sup>5</sup> *Yost v. Devault*, 3 Iowa 345 ; same, 9 Id. 60.

<sup>6</sup> *Presser v. Hildebrand*, 23 Iowa 483.

It would be no obstacle to a decree for specific performance, to the extent of his ability, against a vendor whose wife refused to join him in the deed, that the boundaries of the homestead had not been designated, platted, and recorded; because the wife might still do this under the statute, giving the homestead such form as they might elect, for the decree itself might provide for this, by directing the homestead to be marked, platted, and recorded within a prescribed time.

**§ 261. A note given in consideration of the cancelation of a bond to convey homestead void, for want of consideration.**—A note given by the obligor in consideration of the cancelation of the obligation to convey his homestead at a future day, is void for want of consideration.<sup>1</sup>

#### BY MORTGAGE.

**§ 262. The homestead is protected against all modes of conveyance,** whether of mortgage or deed absolute, unless released or disposed of in the manner pointed out by statute. As a general rule, in order to make a valid mortgage on the homestead, within the statutory value or quantity, such mortgage must be the joint act of husband and wife.<sup>2</sup> The homestead is not affected by anything which the husband does, or suffers to be done, without the concurrence

<sup>1</sup> Berlin v. Burns, 17 Texas 532.

<sup>2</sup> Rogers v. Renshaw, 37 Texas 625; Burns v. Jones, 37 Texas 50; Stewart v. Mackay, 16 Texas 56; Patterson v. Kreig, 29 Ill. 514; Dorsey v. McFarland, 7 Cal. 342; Marshall v. Barr, 35 Ill. 106; Revalk v. Kraemer, 8 Cal. 66; Best v. Allen, 30 Ill. 30; Van Reynegan v. Revalk, 8 Cal. 75; Williams v. Starr, 5 Wis. 534; Cook v. Klink, 8 Cal. 347; Hait v. Haule, 19 Wis. 472; Lies v. Diablar, 12 Cal. 327; Chamberlin v. Lyell, 3 Mich. 448; Brooks v. Hyde, 37 Cal. 366; Fisher v. Meister, 24 Mich. 447; Lassen v. Reynolds, 13 Iowa 579; Connor v. McMurry, 2 Allen 202; Alley v. Bay, 9 Iowa 509; Adams v. Jenkins, 16 Gray 146; Lawver v. Stingerland, 11 Minn. 447; Thorn v. Darlington, 6 Bush 448; Gunnison v. Twitchell, 38 N. H. 62; Howe v. Adams, 28 Vt. 541; Atkinson v. Atkinson, 37 N. H. 434; Jenny v. Grey, 5 Ohio St. 45; Clark v. Shannon, 1 Nev. 568; Burnside v. Terry, 45 Ga. 621; Rev. Stat. N. Y., 1850, p. 615; Simpson v. Robert, 35 Ga. 180; Williams v. Williams, S. C. Tenn., April, 1874; Dollman v. Harris, 5 Kans. 597; Morris v. Ward, 5 Kans. 239.

of the wife. Thus, where a married man mortgaged the homestead without the concurrence of his wife, and the husband and wife subsequently mortgaged the homestead to another person, the mortgagees of the first and second mortgage both foreclosed their mortgages, neither making the other a party, whereupon the mortgagee of the husband and wife filed a bill against the mortgagee of the husband alone, to set aside the decree of foreclosure of the latter, alleging that the homestead premises did not exceed the statutory value. The Court held that the holder of the mortgage executed by the husband and wife could urge the same objections to the mortgage executed by the husband alone, that the husband and wife could, and that the decree of foreclosure of the mortgage executed by the husband alone was a cloud upon the title of the holder of the joint mortgage, and was entitled to have it set aside. The reason of the rule assigned was, that any other would allow the husband alone the power to obstruct the right of alienation belonging to both husband and wife.<sup>1</sup> A mortgage executed by the husband alone being thus void, so far as the actual homestead is concerned, it may be sold and conveyed by the husband and wife jointly, and the purchaser will take the title free from all incumbrances, notwithstanding such mortgage. And if a decree of foreclosure be entered on such a mortgage, so executed, after sale or abandonment, against the husband, wherein the wife is not a party, the decree would be void so far as her interests could be affected. The same principles apply, in every respect, to mortgages or conveyances executed by, or judgments rendered against, the wife alone, notwithstanding that the legal title to the homestead may be in the wife.<sup>2</sup>

<sup>1</sup> *Dorsey v. McFarland*, 7 Cal. 342; *Rogers v. Renshaw*, 37 Texas 625; *Alley v. Bay*, 9 Iowa 509.

<sup>2</sup> *Lamb v. Shay*, 14 Iowa 567; *Dollman v. Harris*, 5 Kansas 597; *Revalk v. Kraemer*, 8 Cal. 66; *Morris v. Ward*, 5 Kansas 239; *Marks v. Marsh*, 9 Cal. 96; *Blue v. Blue*, 38 Ill. 10; *Green v. Marks*, 25 Ill. 221; *Bonnell v. Smith*, 53 Ill. 377; *Hume v. Gossett*, 43 Ill. 297. It was held in California, in the above case of *Revalk v. Kraemer*, where a mortgage was given by the husband alone on the homestead, that neither the right of the husband or wife could be affected by the proceedings to foreclose such mortgage, the wife not being a party. Legal proceedings, to be conclusive against either, must embrace both.

**§ 263. Death of wife does not validate void mortgage.**—A mortgage which is void, because upon the homestead, signed by the husband alone, will not become valid by reason of the homestead right being lost by the death of the wife of the mortgager without children; the debt which the mortgage was intended to secure is not impaired, but is placed upon the same level with other debts, and must be enforced in the same manner.<sup>1</sup> Thus, where after foreclosure in an action against the husband alone, on a mortgage executed by him, the husband and wife joined in a mortgage to a third party, it was held that the foreclosure of the first mortgage bound no one as to the homestead, and that the second mortgage was absolute as against the homestead, and that the wife's decease before the second mortgage was recorded did not impair it as against a void mortgage.<sup>2</sup>

**§ 264. Acknowledgment of the wife in executing mortgage.**—In executing a valid mortgage, affecting the homestead, it is essential that the wife observe the same formalities that are required in absolute conveyances, that, is in the acknowledgment, and in being examined separate and apart from the husband.<sup>3</sup> A mortgage of land belonging to the husband, executed but not acknowledged by the wife in the prescribed form, is inoperative, and will not be enforced in equity. It follows; therefore, that as to the homestead a mortgage cannot be enforced against either of the mortgagors. It is only good to convey the husband's interest in lands which may be comprised in the mortgage, but will not embrace the homestead.<sup>4</sup> In Minnesota, however, this requirement of the statute has been changed, so that the signature of the wife

<sup>1</sup> *Revalk v. Kraemer*, 8 Cal. 66; *Williams v. Starr*, 5 Wis. 534; *Alley v. Bay*, 9 Iowa 509. Per contra, see *Larsen v. Reynolds*, 13 Iowa 579; *Stewart v. Mackey*, 16 Texas 56.

<sup>2</sup> *Van Reynegan v. Revalk*, 8 Cal. 75; *Cook v. Klink*, 8 Cal. 347; *Moss v. Warner*, 10 Cal. 296; *Lies v. Diablar*, 12 Cal. 327; *Fisher v. Meister*, 24 Mich. 447; *Blue v. Blue*, 38 Ill. 10. But see distinction as to effect of foreclosure of both mortgages, one free from homestead right and one subject to it, where no redemption in case of *Silsbee v. Lucas*, 36 Ill. 462.

<sup>3</sup> See Sec. 243, and cases there cited.

<sup>4</sup> *Hait v. Haule*, 19 Wis. 472; *McMurry v. Connor*, 2 Allen 205.

simply is sufficient under the statute of 1860 in the absence of any fraud practiced upon her in obtaining it.<sup>1</sup>

**§ 265. Special release of the right of homestead.**—In a few of the States, besides the other formalities noticed, it is further necessary that there be an express release of the homestead right, and the wife must join in the mortgage or deed, and the certificate of acknowledgment thereto must show that the wife released the right freely and voluntarily.<sup>2</sup> Thus, where a husband and wife executed a mortgage upon lands to which a homestead right had attached, it was held not sufficient to pass such right, that it expressly released the right in the body of the deed, it not appearing from the certificate of acknowledgment that the wife acknowledged that she released this particular right freely and voluntarily, and without compulsion.<sup>3</sup> Without it so appears, the deed or mortgage will be inoperative as a release of that right; as the law has made the signature and acknowledgment of the wife a condition of the alienation of the homestead, her release alone of the fee or her dower in the premises is not sufficient. It must appear from the certificate of acknowledgment that the wife has especially released her right to claim the benefits of the homestead act.<sup>4</sup> So, where a deed of trust was executed by a householder and his wife, containing no words of release of the right of homestead of the grantors, and the certificate of acknowledgment only set forth that the wife relinquished her right of dower in the premises, and had “no desire to retract the same,” it was held that the homestead right of the grantors did not pass by the deed.<sup>5</sup> Again, where a husband and wife executed a deed of trust on their homestead, the deed containing no release or waiver of the right thereto, the debt thereby intended to be secured

<sup>1</sup> *Lawver v. Slingerland*, 11 Minn. 447.

<sup>2</sup> *Boyd v. Cuddeback*, 31 Ill. 113; *Smith v. Miller*, 31 Ill. 160; *Vanzant v. Vanzant*, 23 Ill. 536; *Adams v. Jenkins*, 16 Gray 146; *Conner v. McMurphy*, 2 Allen 202.

<sup>3</sup> *Boyd v. Cuddeback*, 31 Ill. 113; *Adams v. Jenkins*, 16 Gray 146.

<sup>4</sup> *Vanzant v. Vanzant*, 23 Ill. 536; *Smith v. Miller*, 31 Ill. 160.

<sup>5</sup> *Thornton v. Boyden*, 31 Ill. 200; *Best v. Allen*, 30 Ill. 30; *Connor v. Nichols*, 31 Ill. 148.



having become due, and being unpaid, the trustee named in the deed proceeded to sell the premises under a power contained in the same instrument. Afterwards, the husband, who remained in occupation of the premises, took a lease thereof from the purchaser at the trustee's sale, for a year, and paid rent. The lessee remaining in possession after the expiration of the lease, the lessor commenced an action of forcible detainer against him to recover possession of the premises. But the Court held that nothing had been done which could operate as a release or waiver of the homestead right. The right not being released by the deed no title passed thereby, nor by the sale under the deed, as against the right. The fact that the husband accepted a lease from the purchaser under the deed and paid him rent, did not change the right of the parties in that regard.<sup>1</sup>

**§ 266. It is not necessary to describe the premises as the "homestead" in a mortgage any more than in a deed, except in those States where a special release is required by statute, as the parties executing such mortgage are presumed to know what they are mortgaging.<sup>2</sup>**

**§ 267. A mortgage of the homestead executed by the husband alone, over statutory value, without the assent of the wife in the manner provided by law, would not be totally void in some of the States, where the land or premises mortgaged exceed the statutory value. The mortgage would be valid as to that excess,<sup>3</sup> or void only to the extent that it could not be enforced as long as the mortgaged premises were occupied as a homestead by the family. Upon their abandonment, or upon the acquisition of another homestead by the head of the family, the mortgage could be enforced.<sup>4</sup>**

<sup>1</sup> *Booker v. Anderson*, 35 Ill. 66.

<sup>2</sup> See Sec. 245, *Pfeiffer v. Riehn*, 13 Cal. 643; *Babcock v. Hoey*, 11 Iowa 375; *O'Brien v. Young*, 15 Iowa 5.

<sup>3</sup> *Gary v. Eastabrook*, 6 Cal. 457; *Sargent v. Wilson*, 5 Cal. 505; *Boyd v. Cudderback*, 31 Ill. 113; *Booker v. Anderson*, 35 Ill. 67; *Clark v. Shannon*, 1 Nev. 568; *Lies v. Diablar*, 12 Cal. 327; *Smith v. Miller*, 31 Ill. 157; *Moss v. Warner*, 10 Cal. 296; *Dye v. Mann*, 10 Mich. 291.

<sup>4</sup> *Stewart v. Mackey*, 16 Texas 56; *Rogers v. Renshaw*, 37 Texas 625; *Young*



§ 268. A mortgage by the husband alone of his interest in lands held in common, would be valid without the signature of the wife, although he and his family reside on the premises, in those States where the right of homestead is denied in lands held by such tenure.<sup>1</sup>

§ 269. A mortgage executed by the husband alone, before occupancy or selection, valid.—The claim of homestead will not prevail against a mortgage signed by the husband alone, before actual occupation of the premises so claimed,<sup>2</sup> or before selection, when the statute of the particular State requires formal selection and recording after occupancy.<sup>3</sup> To entitle a mortgagor to a homestead in mortgaged premises, such mortgagor must not only be the head of a family, but at the time of the execution of the mortgage must reside with his family, and so continue to reside on the mortgaged premises.<sup>4</sup> Occupation by a tenant will not do ; for instance, where a tract of land is leased to a tenant who cultivated it, while the owner and his family lived upon a distinct tract of land, there is no such occupation of the leased tract as will establish the homestead right thereto, or avail to defeat a mortgage executed during the tenancy of the lessee, by reason of the homestead law.<sup>5</sup>

So, in California, the Court said in deciding whether a mortgage was valid or not : “The whole case resolves itself into this statement : the husband, after the death of his wife,

*v. Graff*, 28 Ill. 20 ; *Atkinson v. Atkinson*, 37 N. H. 434 ; *Pidgeon v. Trustees of Schools*, 44 Ill. 501 ; *Gee v. Moore*, 14 Cal. 475 ; *Bowman v. Norton*, 16 Cal. 214 ; *Smith v. Provin*, 4 Allen 516 ; *Silloway v. Brown*, 12 Allen 30.

<sup>1</sup> *West v. Ward*, 26 Wis. 579 ; *Wolf v. Fleischacker*, 5 Cal. 244 ; *Thurston v. Maddock*, 6 Allen 427 ; *Elias v. Verdugo*, 27 Cal. 420. See Chap. 5, Sec. 120-128, and this Chapter, Sec. 240.

<sup>2</sup> *Cary v. Tice*, 6 Cal. 625 ; *Kellersberger v. Kopp*, 6 Cal. 563 ; *Benson v. Aitken*, 17 Cal. 163 ; *Foss v. Stratcher*, 42 N. H. 40 and 43 ; *McCormick v. Wilcox*, 25 Ill. 274 ; *Fergus v. Woodworth*, 44 Ill. 377 ; *Slaughter v. Detiney*, 10 Ind. 103 ; *Slaughter v. Detiney*, 15 Ind. 49 ; *Thompson v. Pickel*, 20 Iowa 490 ; *Olson v. Nelson*, 3 Minn. 53 ; *Jarboe v. Colvin*, 4 Bush 71.

<sup>3</sup> *Cohen v. Davis*, 20 Cal. 187, and *Lord v. Morris*, 18 Cal. 482 ; see *Himmelman v. Schmidt*, 23 Cal. 117 ; *Barber v. Babel*, 36 Cal. 11 ; *Low v. Allen*, 26 Cal. 141 ; *Lent v. Shear*, 26 Cal. 370.

<sup>4</sup> *McCormick v. Wilcox*, 25 Ill. 274 ; *Fergus v. Woodworth*, 44 Ill. 377.

<sup>5</sup> *Tourvill v. Pearson*, 39 Ill. 447 ; *Benson v. Aitken*, 17 Cal. 163.

had a right to dispose of the premises, whether they were homestead or not, at his sole pleasure, by any lawful means of disposing of real estate. He had a right by his sole will to abandon those premises as homestead ; he did apparently so abandon them ; while in this condition he conveyed them to the mortgagee. The fact that at this time he was again married did not affect the conveyance. The mortgagee was not bound to take notice of the fact, nor was it shown that he knew it. The mortgagee cannot be charged, in the face of the fact that the premises were in possession and occupancy of the tenant—of the mortgagor—with knowledge that the mortgagor, against the effect of his own deed, and against the implied assurance of a right to sell the premises claimed, or was about to resume possession of them as a homestead.”<sup>1</sup> Again, where a man’s wife was absent for nearly two years in another State, on a visit, and during such absence the husband purchased and improved certain property, with the intention of making it his home, and before the return of his wife executed a mortgage upon it, the property was holden not to be homestead as against the mortgage.<sup>2</sup>

**§ 270. Husband alone may give a renewal mortgage where former mortgage was a valid lien.**—Where an old mortgage, which was a valid lien upon the premises, which became a homestead, is released and paid off with money procured by a new mortgage, the acts being contemporaneous, or nearly so, in equity the transaction is an assignment of the first mortgage in consideration of the money advanced by the second mortgage, not the creation of a new incumbrance, but changing the form of the old, and this will be the case

<sup>1</sup> *Benson v. Aitken*, 17 Cal. 163.

<sup>2</sup> *Rix v. McHenry*, 7 Cal. 89 ; *Carey v. Tice*, 6 Cal. 625. But see case of *Gambette v. Brock*, 41 Cal. 78, wherein it is held that a married woman may claim a homestead, notwithstanding her husband never resided or made his home upon the premises, or joined in making the declaration under stat. of 1860. To the same effect as *Rix v. McHenry*, see *Charless v. Lamberson*, 1 Iowa 435 ; *Weisner v. Farnham*, 2 Mich. 472. For contrary opinion see *Williams v. Sweetland*, 10 Iowa 51, where it was held that a residence by the husband with his housekeeper, he awaiting the arrival of his wife and children from another State, was sufficient to impress the homestead character upon the premises. Hence a conveyance before the wife’s arrival by the husband alone was void.

even where the wife does not join in the execution of the second mortgage.<sup>1</sup> So, where a mortgagee, who was in possession under an entry to foreclose at the date of the passage of the Homestead Act of 1855, in Massachusetts, and afterward discharged his mortgage, took a new mortgage for the same amount, and gave up possession. It was held that the discharge of the old mortgage and the taking of the new one being part of the same transaction, that no estate of homestead was acquired by the mortgagor, or his family, as against the mortgagee.<sup>2</sup> But it must appear that the first mortgage, for which the second is given in renewal, was a lien superior to the right of homestead.<sup>3</sup> Thus, as in some of the States, it is held that the act does not apply where a mortgage was executed on the land prior to the passage of the homestead act, therefore it would be a lien superior to the homestead estate.<sup>4</sup>

**§ 271. The husband alone cannot prolong the lien of mortgage, without wife's consent, after selection and recording, or prolong the statute of limitations, thereby creating a new right, nor to destroy the homestead right in this way, any more than in any other manner, by his sole will. He has no power alone to affect an existing homestead. He cannot, by his act alone, execute a new note and mortgage in place of a prior one given on the homestead before the declaration of homestead was filed, nor can he, by any act, continue the old mortgage in life, as to the homestead interest, beyond the time when it would be otherwise barred by the statute of limitations.<sup>5</sup> The principle is well established in California, that, after a conveyance of mortgaged premises, or the transfer of any interest therein, the mortgagor has no**

<sup>1</sup> *Swift v. Kraemer*, 13 Cal. 526; *Carr v. Caldwell*, 10 Cal. 384; *White v. Shepherd*, 16 Texas 163; *Tunstall v. Jones*, 25 Ark. 272; *Cossell v. Ross*, 33 Ill. 244; *Hawkes v. Hawkes*, 46 Ga. 204; *Christy v. Dyer*, 14 Iowa 438; *Lassen v. Vance*, 8 Cal. 271; *Griffin v. Trentlin*, 48 Ga. 148; *Roupe v. Carradine*, 20 La. An. 244. But see *Barber v. Babel*, 36 Cal. 22, what appears contrary rule, but under particular statute of 1860.

<sup>2</sup> *Burns v. Thayer*, 101 Mass. 426.

<sup>3</sup> *Griffin v. Trentlin*, 48 Ga. 148.

<sup>4</sup> *Roupe v. Carradine*, 20 La. An. 244.

<sup>5</sup> *Barber v. Babel*, 36 Cal. 21; *Spencer v. Friedendall*, 15 Wis. 666.

power to create, revise, renew, or prolong a charge upon the premises, or interest therein, while such interest remains in another party. This is plain enough upon principle. A party can affect, by his own acts, only that which he himself owns and can affect even that only in some mode allowed by law.<sup>1</sup> So, after a mortgage has once been paid, it cannot, by a mere verbal agreement between the parties, be transferred to a new debt which it was not originally given to secure; and even if this could generally be done, it could not be done with a mortgage on the homestead, without the wife's consent, by reason that it would violate that provision of law which makes void any conveyance of the homestead without the consent and signature of the wife.<sup>2</sup>

**§ 272. Mortgages on the homestead executed by husband and wife—The wife may plead usury against the note executed by the husband alone—acts which would estop him from setting up usury in the notes, as a defense would not estop the wife in respect to the homestead. She is interested in protecting the homestead right from any illegal or usurious incumbrance, or in reducing the amount of any recovery under which the same might be sold.<sup>3</sup>**

**§ 273. Homestead in wife's land mortgaged for husband's debt—Strict foreclosure not allowed.—**Where a married woman owning real estate in her own right voluntarily mortgages it to secure a debt due by her husband, equity will decree that the debt shall be paid out of the fund so set apart for that purpose, and will decree a sale. But if the estate mortgaged is claimed as a homestead, or greatly exceeds in value the amount for which it is incumbered, a strict foreclosure will not be allowed; unless the homestead right has been waived, the sale must be made subject to that right.<sup>4</sup>

<sup>1</sup> Lord v. Morris, 18 Cal. 482; Lent v. Morrill, 25 Cal. 499; Lent v. Shear, 26 Cal. 370; Low v. Allen, 26 Cal. 141.

<sup>2</sup> Campbell v. Babcock, 27 Wis. 512.

<sup>3</sup> Campbell v. Babcock, 27 Wis. 512; Thompson v. Pickel, 20 Iowa 490

<sup>4</sup> Young v. Graff, 28 Ill. 20.

**§ 274. Mortgage of homestead to secure partnership debt of husband.**—If a husband and wife mortgage a homestead to secure the payment of a partnership debt of which firm the husband is a member, and subsequently to the execution of the mortgage the firm makes an assignment for the benefit of their creditors, the mortgagee is entitled to a pro rata share of the proceeds of the assets of the partnership in the hands of the assignee, and the homestead is only liable for the deficiency. The mortgaging of a homestead by a husband and wife to secure a partnership debt, the husband being a member of the copartnership, does not give to the other creditors of the partnership a right to make liable to their debts the homestead so mortgaged.<sup>1</sup>

**§ 275. A third party cannot set up want of release of homestead right with notice of lien.**—Where the husband and wife execute a mortgage upon their homestead without the statutory waiver in Illinois, and afterwards convey it to a third party subject to the mortgage lien, and which lien formed a part of the purchase price, it was held in a suit to foreclose by the mortgagee that the third party who purchased the premises subject to such lien was estopped from setting up as a defense the omission of the husband and wife to release their homestead right in the mortgage.<sup>2</sup>

**§ 276. Mortgage of several parcels of land including homestead.**—In foreclosing such mortgage, the homestead should be sold only to supply the deficiency remaining after exhausting the other property mortgaged. A sale in a "lump" of several distinct parcels of land described in one mortgage in the foreclosure thereof, constitutes sufficient ground for setting a sale aside, and ordering a resale.<sup>3</sup> But in Wisconsin, in a foreclosure sale under a mortgage which covered the mortgagor's homestead, as well as his other real estate, the sheriff, contrary to the mortgagor's request, refused to offer first the non-exempt land, but sold the homestead alone for

<sup>1</sup> Dickson v. Chorn, 6 Iowa 21 ; Lambert v. Powers, 36 Iowa 18.

<sup>2</sup> Pidgeon v. The Trustees of the Schools, 44 Ill. 501.

<sup>3</sup> Boyd v. Ellis, 11 Iowa 97 ; Lay v. Gibbons, 14 Iowa 377.

the amount of the judgment. Certain creditors of the mortgagor had liens of judgments on the non-exempt property. The Court held that the sale could not be disturbed. Dixon, C. J., said: "However just and reasonable it might be for the Court to compel a sale of the business lot first, and thus save the homestead, if that were the only question, yet we think Dow's equity to hold his homestead fully countervailed by the equities of his creditors, who must look to the business lot for their satisfaction, and who have no lien upon the homestead. Until the legislature shall have declared the obligation to preserve the homestead superior to that of paying one's honest debts, we must hold the equity of the creditor at least equal to that of the debtor in cases like this."<sup>1</sup>

The reasoning is exceedingly unsatisfactory, but the hostility of the Chief Justice to the homestead law is displayed in all his opinions.

The legislature of Wisconsin availed themselves of the suggestion of the Chief Justice, in enacting, in 1870:<sup>2</sup> That if any portion of the mortgaged premises shall consist of a homestead, it shall be the duty of the Court, in such manner as it shall direct, to ascertain whether the part of such mortgaged premises not included in the homestead can be sold separately without injury to the owner, and if the Court shall so find, then in that case the judgment shall provide that the homestead shall not be sold, nor offered for sale, until all other lands covered by the mortgage and described in the complaint shall have been offered and sold, and that the homestead should not be sold until all the other lands so covered by the mortgage are sold.<sup>3</sup>

**§ 277. Mortgage, character of exemption laws.**—IN PENNSYLVANIA, the exemption laws are merely of a quasi homestead character. The exemption extends to either real or personal property, or both, of the debtor, in all to the value of three hundred dollars, which may be claimed at any time before levy and sale. The exemption laws in that

<sup>1</sup> *Jones v. Dow*, 18 Wis. 241; *White v. Polleys*, 20 Wis. 530.

<sup>2</sup> Rev. Stat. (1870) Chap. 113, amendatory of Sec. 1, Chap. 145.

<sup>3</sup> *Lloyd v. Frank*, 30 Wis. 306.

State receive a strict construction by the Courts, which may be said, in some instances, to be hardly in unison with the more recent and advanced views expressed by a majority of the sister States, in relation to the homestead and exemption laws. Still, many of the Pennsylvania decisions may be useful in interpreting and giving effect to the statutes that have been passed in other States from time to time, on the subject of exemptions.

The Exemption Act of April 9th, 1849, is construed as a mere limitation of the remedy given by the law against a debtor's property, for "judgments obtained upon contract." The word "contract" in the act is held to refer to the distinction in pleading between actions arising ex-contractu, and actions sounding in tort. That although a mortgage is a contract, and the process authorized to issue thereon results in a judgment, such a judgment was not in the view of the legislature when the Exemption Act of 1849 was passed, and that the exemption law did not apply to a debt secured by a mortgage so as to exempt any part of the mortgage premises from sale under proceedings on the mortgage or the bond accompanying it, as against the mortgagee.<sup>1</sup>

It is further held that a defendant is not entitled to the benefit of the exemption of \$300, under the Act of 1849, in the case of a sale on *levari facias* on a mortgage of real estate. "The mortgagee has a special lien, and he may enforce it in Pennsylvania by an ejectment against the mortgagor, in which proceeding it cannot be pretended that there could be any claim for the \$300 exemption." The act does not apply to a *levari facias* on a mortgage, "because it is not a levy and sale upon judgment obtained upon contract; there is no levy; there is strictly no judgment obtained upon the contract."<sup>2</sup>

Nor is a mortgagor, when his land is sold under a *levari*, entitled to \$300 out of the surplus which remains after the satisfaction of the mortgage, but he is bound to relinquish the whole to his judgment creditors. It said by the Court that a man who executes a mortgage virtually waives his

<sup>1</sup> Gangwere's Appeal, 36 Penn. St. 466.

<sup>2</sup> Morgan v. Noud, 5 Penn. L. J. R. 93.



he exemption by pledging the whole of the property payment of the mortgage debt, and that he cannot be so set up a claim against other creditors which he has held in favor of the mortgagee.<sup>1</sup>

The foregoing decisions, which were rendered in 1860, prior thereto, the Court has modified the rule to a extent. Thus, in 1871, the rule is stated to be that husband and wife have executed a junior mortgage, and waiving the claim to exemption, and their property is sold under such mortgage, the waiver does not affect the exemption as to prior liens. But an express waiver in favor of a junior lien deprives the debtor of all power to participate in the distribution of a fund, and leaves it to be appropriated amongst creditors precisely as if the exemption law did not exist. Yet it is said that it would be a straining of this principle to enforce its application to the distribution of an entire fund in consequence of the implied waiver resulting from the execution of a mortgage. As against a mortgagee the rights of the debtor are gone. The execution of a mortgage does not amount to a waiver of all claims to exemption, as against general judgment creditors.

Held, that in such case the fund must be distributed in this manner : 1st, the payment of the mortgage or mortgages ; 2d, to the debtor under the exemption law ; 3d, the residue to the judgment liens in the order of their priority.<sup>2</sup>

#### BY ABANDONMENT.

**§ 278. General review of the question of abandonment.**—In those States where no statutory mode has been provided, either for giving notice of the claim of homestead, or of abandoning such homestead after it has once been acquired, and as the homestead is very tenderly regarded by the Courts, it is confessedly difficult to lay down any rule which will ap-

<sup>1</sup> *The Saving Fund v. Creighton*, 3 Phila. R. 58.

<sup>2</sup> *Bower's Appeal*, 68 Penn. St. (18 P. Smith) 126.



ply in all cases, as to what shall constitute an abandonment of the homestead. It was a question at one time, whether, in aid of the homestead, the rule in relation to domicile should not be applied, viz: that the old domicile remains until the party has acquired another,<sup>1</sup> but that rule was never applied in its integrity. The Courts, though admitting that less evidence than that of the acquisition of a new homestead will be sufficient to prove the abandonment of a former homestead, so as to subject the property to forced sale, yet held that it must be undeniably clear and "beyond the shadow of a reasonable doubt" that there has been a total abandonment with no intention to return and claim the exemption.<sup>2</sup>

"The question of abandonment of homestead, or by what acts and circumstances a person who has a homestead forfeits his rights to the exemption, before or without acquiring a new homestead, presents great difficulty. The rules in relation to domicile, the "abandonment of the old and the acquisition of the new domicile, are not, if it be admitted that mere abandonment will forfeit the homestead right, altogether applicable. For it is a maxim that every one must have a domicile somewhere, and also, that he can have but one; that his domicile continues until he can acquire another, and that by acquiring a new domicile he relinquishes his former one." The more correct principle, says Judge Story, is that the original domicile is not lost until a new one is acquired *facto et animo*.<sup>3</sup>

"If we admit that an old homestead may, in opposition to

<sup>1</sup> As to the question of Domicile, see *Am. Lead. Cases*, vol. 1, 737; 9 *Ed. Kent*, vol. 4, 338, and note; *The Republic v. Young*, Dallum 464; *Phillips v. The City of Springfield*, 39 Ill. 83; *State v. Skidmore*, 5 Texas 469; *Shepherd v. Cassidy*, 20 Texas 24; *Story, Conflict of Laws*, Secs. 45, 47; *Gauhenaut v. Cockrell*, 20 Texas 96; *Thorndike v. City of Boston*, 1 Met. 242; *Walters v. The People*, 21 Ill. 178; *Sears v. City of Boston*, 1 Met. 250; *Forbes v. Harper*, 15 Cal. 202; *Holden v. Pinney*, 6 Cal. 234; *Horn v. Tufts*, 39 N. H. 478; *Nims v. Bigelow*, 45 N. H. 347.

<sup>2</sup> *Gauhenaut v. Cockrell*, 20 Texas 96; *Cox v. Shopshire*, 25 Texas 113; *Mills v. Van Boskirk*, 32 Texas 360; *Shepherd v. Cassidy*, 20 Texas 24; *Titman v. Moore*, 43 Ill. 170; *Taylor v. Hargous*, 4 Cal. 268; *Hoitt v. Webb*, 36 N. H. 158; *Locke v. Rowell*, 47 N. H. 46; *Wood v. Lord*, 51 N. H. 448; *Folsom v. Carli*, 5 Minn. 333.

<sup>3</sup> *Story, Conflict of Laws*, Sec. 47.

this rule, with regard to the change of domicile, be abandoned before the acquisition of a new one, it can only be on the most clear and conclusive facts of abandonment of the homestead with an intention not to return. An old domicile cannot be forfeited without conclusive proof that a new one has been acquired. If an old homestead can be lost without proof that a new one has been gained, certainly the circumstances to show abandonment must be clear and decisive. We do not intend to assert the proposition that an old homestead remains until a new one has been gained. This would perhaps too much embarrass and obscure the conditions and rights of property to receive judicial sanction, there being no law or statute to that effect. But while this is admitted, we must remember the wise and beneficent purpose of the homestead exemption," "and a right so strongly secured, founded on such high public policy, cannot be lost by the mere absence of the party or the family intended to be benefited. The homestead is not to be regarded as a species of prison bounds, which the owner cannot pass over without pains and penalties. His necessities or circumstances may frequently require him to leave his homestead for a greater or less period of time. He may leave on visits of business or pleasure, for the education of his children, or to acquire in some more favorable locality means to improve his homestead or for the subsistence of his family, or he may intend to abandon provided he can sell. But let him leave for what purpose he may, be his intentions what they may, provided they are not those of total relinquishment or abandonment, his right to the exemption cannot be regarded as forfeited. And if he did intend, on leaving, to abandon, this may be changed by him up to the time he acquires a new homestead. He may show this change by the resumption of his residence, or it may be made known in other modes, and however it may be made known or ascertained, it will be effectual to protect his rights ; for if the place be in fact his homestead it cannot be exposed to forced sale. Frauds will not be permitted, but the right to the homestead cannot be forfeited unless by a party showing a continuous

abandonment up to the time that some opposing right by sale has vested legally in other parties."<sup>1</sup>

So, in Massachusetts, it has been expressly held, after an exhaustive review of all the authorities bearing on the question, that an estate of homestead acquired cannot be lost by a mere departure therefrom until a new homestead has been acquired elsewhere.<sup>2</sup> In Mississippi, the abandonment or forfeiture of the homestead right is only declared upon clear and decisive proofs of an intention totally to relinquish and abandon such premises. If the intention to abandon the homestead exists, such intention may be changed, and if possession be resumed before intervening rights have attached, the homestead will be protected.<sup>3</sup> But upon the acquisition of a new homestead, the right to the former is abandoned. If the debtor removes from one to another, and is owner of both, the immunity applies to the latter. He may change the homestead without the wife's consent, but so long as the wife and family occupy the premises, although the husband may have left them, it is still the homestead until the husband has actually acquired and established another.<sup>4</sup> In New Hampshire, it is said that it is the unequivocal act of abandonment by the person holding the homestead right, which only can deprive him or her of the estate, such as is evinced by a sale or absolute conveyance, or by change of domicile, or by a substitution of another estate elsewhere, and verbal testimony is admissible to show a change of domicile, and the intention to change it is a matter of fact to be found.<sup>5</sup>

**§ 279. Occupation of the premises selected, as a general rule, is requisite to protect the homestead from sale or execution.<sup>6</sup> But there are exceptions to this rule. It has been**

<sup>1</sup> *Shepherd v. Cassidy*, 20 Texas 24; *Moss v. Warner*, 10 Cal. 296; *Harper v. Forbes*, 15 Cal. 202; *Brennan v. Wallace*, 25 Cal. 110.

<sup>2</sup> *Woodbury v. Luddy*, 14 Allen 1; *Drury v. Bachelder*, 11 Gray 214.

<sup>3</sup> *Campbell v. Adair*, 45 Miss. 170.

<sup>4</sup> *Thoms v. Thoms*, 45 Miss. 263.

<sup>5</sup> *Hoitt v. Webb*, 36 N. H. 158; *Horn v. Tufts*, 39 N. H. 478; *Wood v. Lord*, 51 N. H. 448; *Titman v. Moore*, 43 Ill. 170; *Locke v. Rowell*, 47 N. H. 46; *Nims v. Bigelow*, 45 N. H. 347; *Warner v. McMillan*, 38 Texas 414; *Folsom v. Carli*, 5 Minn. 333-337.

<sup>6</sup> *Charles v. Lamberson*, 1 Iowa 435; *Christy v. Dyer*, 14 Iowa 438; *Williams*

held, in Illinois, that actual residence is not, under all circumstances, essential. That the occupancy required by the statute might be by a tenant for the benefit of a widow and minor children. That, "if the statute, in their case, was to be construed as requiring a personal occupancy, it would be rendered wholly nugatory." In order to give the statute effect, it must be construed as requiring only such occupancy as the condition and best interests of the parties on whom the homestead right has devolved, may require.<sup>1</sup> To carry out the object of the statute, it may become necessary, when the husband is dead, and especially so when both parents have died, and the children entitled to the benefits of the law are of tender years, that a residence by a tenant may be substituted for an actual occupancy by the widow and children. But it is only in such cases, and under such peculiar circumstances, that the residence of the person claiming the benefit of the act can be dispensed with.<sup>2</sup> In such cases, of widows and orphans, no rule can be laid down to govern, but each case must be disposed of upon its own peculiar circumstances.<sup>3</sup> In Massachusetts, it has been held that a widow who uses a room in the house which used to be the dwelling-house of her husband during his life, and was occupied by him as a homestead, for the purpose of storing her furniture, continues to occupy the homestead within the meaning of the law, so as to be entitled to the benefit of the homestead exemption.<sup>4</sup>

**§ 280. Removal from the premises after conveyance by husband, not abandonment.**—Occupancy by the family is presumptive evidence of the appropriation of a place as a homestead, and is consequently notice to all the world. The removal of the husband and wife from a homestead thus ap-

*v. Sweetland*, 10 Iowa 51; *Cole v. Gill*, 14 Iowa 527; *Gregg v. Bostwick*, 33 Cal. 229; *Gambetta v. Brock*, 41 Cal. 83; *Mann v. Rogers*, 35 Cal. 319; *Estate of Delany*, 37 Cal. 179; *Folsom v. Carli*, 5 Minn. 333, changed by statute of 1860.

<sup>1</sup> *Walters v. The People*, 21 Ill. 178; *Titman v. Moore*, 43 Ill. 170; *Brinkerhoff v. Everett*, 38 Ill. 263; *Volger v. Montgomery*, 54 Mo. 577.

<sup>2</sup> *Kitchell v. Burgwin*, 21 Ill. 40; *Cabeen v. Mulligan*, 37 Ill. 230.

<sup>3</sup> *Cabeen v. Mulligan*, 37 Ill. 230; *Blue v. Blue*, 38 Ill. 10. See *Stewart v. Brand*, 23 Iowa 478; *Fyffe v. Beers*, 18 Iowa 5; *Orman v. Orman*, 26 Iowa 361.

<sup>4</sup> *Braheen v. Fox*, 100 Mass. 234. See *Denton v. Woodbury*, 24 Iowa 74.

propriated, after and in consequence of a sale and conveyance by the husband, in which the wife did not join, furnishes no evidence of an abandonment of the homestead by her, but seems "to be the very case against which the law intended to provide." This estate, once acquired, cannot be altered or destroyed, except by the concurrence of both husband and wife in the manner provided by law.<sup>1</sup> Nor will a conveyance by the husband and wife, of the homestead to a third party, under an agreement that it should be conveyed to the wife by the grantee, constitute an abandonment, or affect the homestead right. It is not a fraud on creditors in thus transferring the legal title, for it was effectually shielded by the provisions of the homestead law from such claim whilst the legal title was in the husband as well as while in the wife.<sup>2</sup> But, though the wife's separate real estate is not liable for the debts of her husband in Iowa, yet if a husband conveys the homestead to his wife by a voluntary conveyance, and afterwards abandons the same with his family, such conveyance will be void against creditors as soon as the abandonment has been consummated, and the abandoned homestead, in such case, will be liable for the husband's debts.<sup>3</sup> But such an abandonment, for a temporary purpose, does not forfeit the homestead as to parties who have not sustained any injuries thereby.<sup>4</sup> But in Illinois it is held that where a husband and his family have abandoned the homestead, and the husband has sold the premises without the consent of the wife, the wife cannot leave her husband while they are living in their new domicile, and intrude on the possession of the purchaser in the former homestead, insisting that she has homestead rights therein. During the lifetime of her husband no

<sup>1</sup> *Taylor v. Hargous*, 4 Cal. 273; *Harper v. Forbes*, 15 Cal. 202; *Dorsey v. McFarland*, 7 Cal. 342; *Estate of Tompkins*, 12 Cal. 114; *Guiod v. Guiod*, 14 Cal. 506; *Holden v. Pinney*, 6 Cal. 234; *Hoitt v. Webb*, 36 N. H. 158; *Horn v. Tufts*, 39 N. H. 478; *Wood v. Lord*, 51 N. H. 448; *Dun v. Tozier*, 10 Cal. 167; *Stewart v. Brand*, 23 Iowa 477; *Wetz v. Beard*, 12 Ohio St. 431; *White v. Clark*, 36 Ill. 285; *Dearing v. Thomas*, 25 Ga. 223; *Nims v. Bigelow*, 45 N. H. 347; *Locke v. Rowell*, 47 N. H. 46.

<sup>2</sup> *Huginin v. Dewey*, 20 Iowa 368.

<sup>3</sup> *Gardner v. Baker*, 25 Iowa 343.

<sup>4</sup> *Morris v. Sargent*, 18 Iowa 90.

homestead claim which she could assert can exist in her.<sup>1</sup> His domicile in law is also her domicile.<sup>2</sup> But if the husband remove his wife and family into another county, and without providing them a home, abandon his wife, she may resume possession of the homestead.<sup>3</sup>

**§ 281. A person having acquired a new residence, even though it is not a homestead,** will not be permitted, in Illinois, to insist upon the homestead right to defeat a deed or mortgage—which does not release the benefits of the act—executed by him while occupying his newly acquired residence, unless it clearly appears that the new residence was only temporary. The husband, being the head of the family, has the right to determine and control their residence, and when he intentionally removes from and abandons the homestead, and his family accompanies him, neither he nor they have any power to resume it, so as to cut off intervening liens which have attached during such abandonment.<sup>4</sup> “We are not prepared to hold that the head of the family may abandon the lot of ground, remove his dwelling to other premises, incumber the premises on which he formerly resided, and after an absence of three years, return to his former home and claim and hold it as a homestead against such incumbrance, merely by showing that it had been his home, and that he had, during his abandonment of the property as a residence, a secret intention at some time in the future to resume it as a home.”<sup>5</sup>

**§ 282. Temporary residence elsewhere no forfeiture of the homestead.**—A residence once in good faith draws around it the protection of the homestead law, and a temporary residence elsewhere, whether for business or pleasure, or a protracted stay even for years, will not forfeit the right un-

<sup>1</sup> *Getzler v. Saroni*, 18 Ill. 511; *Guiod v. Guiod*, 14 Cal. 507.

<sup>2</sup> *Phillips v. City of Springfield*, 39 Ill. 83; 14 Cal. 507.

<sup>3</sup> *Walters v. The People*, 21 Ill. 178.

<sup>4</sup> *Titman v. Moore*, 43 Ill. 170; *Thoms v. Thoms*, 45 Miss. 263; *Campbell v. Adair*, 45 Miss. 170.

<sup>5</sup> *Fergus v. Woodworth*, 44 Ill. 377.

less the design of permanent abandonment be apparent.<sup>1</sup> Where a debtor, being the owner of a house and lot occupied by himself and family, the only real estate he owned, not exceeding the statutory value, leased the same and went with his family to another county of the State for temporary purposes, it was held that the debtor did not lose his right to have the homestead set off to him by leasing the premises for the year, and going away with his family for temporary purposes.<sup>2</sup> So, in Illinois, where a judgment debtor owning a homestead and residing thereon, rented the premises for three years, and removed therefrom with his family in the fall of the year to a town in the same county for the purpose of earning money to pay his debts, but with the intention of returning, and did return the following spring and resumed the occupancy of his homestead with his family, it was held that these facts were not sufficient to show an abandonment of the homestead;<sup>3</sup> but the intention to return and occupy the homestead must be clearly manifest from surrounding circumstances,<sup>4</sup> as where a party left the State to better his condition, and being taken sick, rented rooms in adjoining State, and kept house there with his wife, and so remained about nine months, but always with the intention of returning to his home, it did not amount to an abandonment of his homestead.<sup>5</sup>

**§ 283. What will be construed as an abandonment.—**  
A debtor who removes with his family to another State, and

<sup>1</sup> *Tumlinson v. Swinney*, 22 Ark. 400; *Buck v. Conlogue*, 49 Ill. 394; *Stewart v. Brand*, 23 Iowa 477; *Wisner v. Farnham*, 2 Mich. 272; *Myers v. Claus*, 15 Texas 516; *Walters v. People*, 18 Ill. 199; *Wright v. Dunning*, 46 Ill. 271; *Cook v. McChristian*, 4 Cal. 25; *True v. Morrill*, 28 Vt. 672; *Norris v. Maulton*, 34 N. H. 392; *Phillio v. Smalley*, 23 Texas 498; *Holden v. Pinney*, 6 Cal. 235; *Campbell v. Adair*, 45 Miss. 170; *Rix v. Capitol Bank*, 2 Dill C. C. 369; *Harper v. Forbes*, 15 Cal. 202; *Moss v. Warner*, 10 Cal. 296; *Guiod v. Guiod*, 14 Cal. 506; *Estate of Phelan*, 16 Wis. 76; *Herrick v. Graves*, 16 Wis. 157; *Williams v. Sweetland*, 10 Iowa 51; *Fyffe v. Beers*, 18 Iowa 5; *Stewart v. Brand*, 23 Iowa 478; *Orman v. Orman*, 26 Iowa 361; *Morris v. Sargent*, 18 Iowa, 90; *Brennan v. Wallace*, 25 Cal. 110.

<sup>2</sup> *Wetz v. Beard*, 12 Ohio St. 431; *Elston v. Robinson*, 23 Iowa 208.

<sup>3</sup> *Wiggins v. Chance*, 54 Ill. 175.

<sup>4</sup> *Titman v. Moore*, 43 Ill. 170.

<sup>5</sup> *Cipperly v. Rhodes*, 53 Ill. 346; *Wright v. Dunning*, 46 Ill. 271.



remains there for two years, may be regarded as having abandoned his homestead, and that without reference to what he may say or do before or after his return. "If he might remove his family and effects to another State, and remain there with them for two years, and still claim his former residence as exempt from sale under the homestead law, we are at a loss to conceive how long an abandonment it would require to subject it to the payment of his debts. To permit such an abandonment without rendering the property liable to forced sale would be to enable debtors to perpetrate numberless frauds upon their creditors."<sup>1</sup> It is said that it requires stronger and clearer proof of abandonment where the indebtedness for which the homestead is sought to be rendered liable was incurred during actual occupancy thereof, than where the party claiming the exemption was not in actual possession of the homestead.<sup>2</sup> Where there is an abandonment of the homestead, with a fixed intention not to return, the property may be subjected to the demand of creditors. But, it must be remembered, the question of abandonment is almost exclusively a question of intent, and that intent must be clearly established by the best accessible evidence; that a party has been absent for an indefinite period is not sufficient to establish the fact of abandonment, unless accompanied with proof of intent not to return. The declaration of a party before, at the time of, and after leaving his home, may be given in evidence to establish the intent.<sup>3</sup> In Kansas, after foreclosure proceedings had, foreclosing a mortgage on the homestead, the fact that the husband left the State and was shortly afterwards followed by his family, was held not sufficient evidence of abandonment of the homestead.<sup>4</sup> In Minnesota, the owner of a homestead could not remove from the premises under the Act of 1858 without forfeiting the exemption.<sup>5</sup> But subsequently,

<sup>1</sup> *Fergus v. Woodworth*, 44 Ill. 377; *Cabeen v. Mulligan*, 37 Ill. 230; *Dunton v. Woodbury*, 24 Iowa 74; *Batts v. Scott*, 37 Texas 65; *McMillan v. Warner*, 38 Texas 414.

<sup>2</sup> *Davis v. Kelly*, 14 Iowa 523.

<sup>3</sup> *McMillan v. Warner*, 38 Texas 414; *Campbell v. Adair*, 45 Mis. 170; *Hoitt v. Webb*, 36 N. H. 158; *Locke v. Rowell*, 47 N. H. 46.

<sup>4</sup> *Rix v. Capitol Bank*, 2 Dill. C. C. 369.

<sup>5</sup> *Tillotson v. Millard*, 7 Minn. 520.



in 1860, the legislature passed an act expressly authorizing the homestead tenant to leave it without rendering it liable to sale on execution. So, in Wisconsin, previous to the Act of 1858, although absence from the homestead, temporarily, on business or pleasure, would not have forfeited the homestead right, a removal therefrom, and the taking of another house, would have worked such a result.<sup>1</sup> The Act of 1858 provides that the owner of a homestead might remove therefrom without forfeiting the exemption.

**§ 284. Repeated efforts to sell, on the part of the husband and wife,** afford no proof of abandonment of the homestead, nor will their declarations of intention to sell and remove from the same constitute an abandonment. The declarations of the husband will in no way bind the wife, and the act of the wife, in going with her husband to reside on another place, will not affect her rights.<sup>2</sup>

**§ 285. Going in search of another home no presumption of abandonment.**—If the citizen or family should leave their homestead in search of another home, the first homestead retains all its privileges and immunities until another one is acquired, and no presumption of abandonment will arise in such case.<sup>3</sup> Where an intention to leave the old and acquire a new homestead has been formed in the minds of the occupants, such intention, until it is consummated by any act, such as surrendering possession, can be changed at any time, and will not amount to an abandonment.<sup>4</sup>

**§ 286. Desertion or adultery on the part of the father, no forfeiture of the homestead right.**—The fact that the husband may have committed adultery will not operate as a forfeiture of his homestead right; the reason as-

<sup>1</sup> Estate of Phelan, 16 Wis. 76; Herrick v. Graves, 16 Wis. 157.

<sup>2</sup> Dunn v. Tozer, 10 Cal. 167; Moss v. Warner, 10 Cal. 296; Stewart v. Brand, 23 Iowa 477; Guiod v. Guiod, 14 Cal. 506; Dorsey v. McFarland, 7 Cal. 342.

<sup>3</sup> Fullerton v. Doyle, 18 Texas 10; Franklin v. Coffee, 18 Texas 417; Wright v. Hays, 10 Texas 130; Hoffman v. Neuhaus, 30 Texas 636; Sampson v. Williams, 6 Texas 109; Eckhardt v. Schlecht, 29 Texas 129; Ives v. Mills, 37 Ill. 73; Walters v. People, 21 Ill. 179; Kitchell v. Bourgwin, 21 Ill. 40.

<sup>4</sup> Cross v. Evarts, 28 Texas 524.

signed is, in Illinois, that his right would also defeat that of his wife, and no act of his can have that effect.<sup>1</sup> Or if he abandons his wife and family she might remain and hold the homestead as against his acts and those of his creditors.<sup>2</sup> Desertion of the family by the father, the family remaining in possession of the homestead, the father is, in the eye of the law, still in the occupation, and able to assert his homestead right. The residence of the family remains the home and residence of the father, at least until it is proved that he has acquired a home and settlement elsewhere, and this the law can never assume that he has done. "The presumption is, that he continues a wanderer without a home until he returns to his duty and his family."<sup>3</sup>

**§ 287. Adultery or desertion on the part of the wife.**—The crime of adultery, or abandonment, or desertion by the wife of the homestead, or of the family, is not a cause of defeating the right of homestead—the statute being silent.<sup>4</sup>

**§ 288. Involuntary absence on part of wife no abandonment by her.**—Where the wife of a homestead owner is compelled by a mortgagee to leave the homestead premises, such absence on her part does not amount to abandonment; but if, having left, she acquires a new homestead, she will not be able to hold the old homestead.<sup>5</sup> So, of a homestead occupied by the husband and wife at the time the husband conveyed it, the wife not joining in the conveyance, it may be claimed by the wife, though abandoned by the husband, unless the husband has acquired a new residence.<sup>6</sup>

**§ 289. Voluntary absence on part of wife.**—A married woman who has withdrawn altogether from the State, and is

<sup>1</sup> Blue v. Blue, 38 Ill. 10.

<sup>2</sup> Titcomb v. Moore, 43 Ill. 170; White v. Clark, 36 Ill. 285.

<sup>3</sup> Moore v. Dunning, 29 Ill. 130.

<sup>4</sup> Lies v. Diablar, 12 Cal. 330.

<sup>5</sup> Horn v. Tufts, 39 N. H. 478; Wood v. Lord, 51 N. H. 448; Nims v. Bigelow, 45 N. H. 347.

<sup>6</sup> White v. Clark, 36 Ill. 285.

domiciled in another State, cannot claim any homestead privileges, nor can a woman who has without good cause voluntarily deserted her husband's bed and board for several (two or three) years immediately previous to his decease, make a claim to the homestead, or widow's allowance at the husband's death. In both these cases the action of the wife has been held to be tantamount to an abandonment of their homestead privileges.<sup>1</sup> The wife is entitled to continue in the occupation of the homestead upon the death of the husband; if, however, she permanently abandons it as a homestead, it ceases to have that character, and she forfeits her right thereto, and becomes a tenant in common with the other heirs.<sup>2</sup> It will be deemed an abandonment on the part of the widow who marries again, and removes from the homestead premises with her husband to another place, if she and her husband have no intention of returning to resume occupancy of the homestead; but a vague design of returning, to be executed and carried out at some indefinite period of time, is not sufficient to preserve the right where the claimant is residing at a different place and on other premises.<sup>3</sup>

**§ 290. Abandonment by minor children.**—It is no abandonment of the homestead by children, some of them being minors, who, after the death of the father and mother, are taken away from the homestead to reside with their kindred; and the homestead occupied by the father at his death may be rented to a tenant by the guardian of the minor children for their benefit, and such leasing of the premises will not constitute an abandonment of the homestead in their case. "It is doubtful whether there can be any valid abandonment of the homestead by minors, unless by order of a Court of equity."<sup>4</sup> In Georgia, where it appeared that a widow with minor children, whose father died in the State, married a

<sup>1</sup> *Trawick v. Harris*, 8 Texas 312; *Earle v. Earle*, 9 Texas 630; *Monk v. Capon*, 5 Allen 146.

<sup>2</sup> *Stewart v. Brand*, 23 Iowa 478; *Orman v. Orman*, 26 Iowa 361; *Monk v. Capen*, 5 Allen 146; *Fyffe v. Beers*, 18 Iowa 5; *Dunton v. Woodbury*, 24 Iowa 74.

<sup>3</sup> *Moore v. Titman*, 43 Ill. 169.

<sup>4</sup> *Blue v. Blue*, 38 Ill. 10.

second time, and she and her husband, after living in the county of her first husband's residence for some time, left the State, taking the minors with them; but frequently avowed their intention of returning to their former home, which they claimed never to have abandoned, and an application was made on behalf of the minors for a homestead out of their father's estate by next friend in the county in which their father died resident: it was held that the minor children were entitled to such homestead, and that if the facts constituted an abandonment by the mother, as far as the children were concerned there was no abandonment.<sup>1</sup>

#### WAIVER OF THE RIGHT OF EXEMPTION.

**§ 291. Waiver of the right must be in writing, properly executed.**—Although the question of “waiver” of the homestead right has been treated under the several sub-heads in the present chapter, such as alienation, mortgage contract, abandonment, etc., yet it may be useful to notice the decisions that have been rendered in those States where no mode is pointed out by which the right may be waived, other than those heretofore noticed; as well as such decisions as were rendered in some States, prior to the passage of any law in relation to waiver.

In many of the States it is provided by statute that no release or “waiver” of the homestead exemption shall be valid unless the same shall be in writing and subscribed by the party or husband and wife. That is, to the extent of the homestead value or quantity.<sup>2</sup>

<sup>1</sup> *Harkins v. Arnold*, 46 Ga. 656. See, for contrary opinion, *Buck v. Coulogne*, 49 Ill. 394, and *Wright v. Dunning*, 46 Ill. 271, where it is held that the widow, being as much the head of the family as the father while living, could abandon the homestead and affect rights of minor children. See *Dunton v. Woodbury*, 24 Iowa 74; *Moore v. Dunning*, 29 Ill. 130; *Cabeen v. Mulligan*, 37 Ill. 230.

<sup>2</sup> *Kitchell v. Burgwin*, 21 Ill. 40; *Vanzant v. Vanzant*, 23 Ill. 536; *Atkinson v. Atkinson*, 37 N. H. 434; *Horn v. Tufts*, 39 N. H. 478; *Davis v. Andrews*, 30 Vt. 678; *Gunnison v. Twitchell*, 38 N. H. 62; *Howe v. Adams*, 28 Vt. 541; *Sargent v. Wilson*, 5 Cal. 504; *Olsen v. Nelson*, 3 Minn. 53. On the other hand, see principles discussed in *Richards v. Chace*, 2 Gray 383; *Williams v. Starr*, 5 Wis. 534; *Yost v. Devault*, 9 Iowa 60; *Alley v. Bey*, 9 Iowa 509; *Jenny v. Grey*, 5 Ohio St. R. 45.

The question of "waiver" has come before the Pennsylvania Courts repeatedly since the Exemption Law of 1836, and more particularly under the revised statute of 1849, which exempts, as already stated elsewhere, \$300 worth of property of the debtor, whether of realty or personalty. There are few or no decisions in any of the other States which have a bearing on the question of "waiver" of the homestead exemption. In fact, a majority of the Pennsylvania decisions have arisen under proceedings affecting personalty under the exemption laws of that State, yet there are many decisions which may aid in the solution of the question of waiver of the homestead right.

In the earlier decisions of that State the statutory privilege is characterized as not being an exemption in itself, but a right to obtain one in a designated manner; if the debtor would secure it he must comply with the conditions of the law. "The exemption is not of the proceeds of sale from application to the payment of the debt, but of the appraised property itself from sale. It was not intended that the debtor should retain money. Where land has been levied upon and by an appraisement, it has been determined that it cannot be divided so as to set apart to the debtor so much thereof as is equal to his requirement—the whole may be sold. Then he may receive from the proceeds of the sale an equivalent from that which would otherwise have been exempted from sale. This exceptional case exists only where the land cannot be divided."<sup>1</sup>

**§ 292. Waiver of the statutory privilege** of exemption of a portion of his property from levy and sale under execution is one which may be waived by the debtor. "When made at the time the debt is created, the waiver is based upon the same consideration as that upon which rests the liability to pay, and is therefore irrevocable. Such a waiver is a contract, that, so far as regards the judgment creditor in whose favor it is made, the debt shall be collecti-

<sup>1</sup> Line's Appeal, 2 Grant's Cases 197; Dodson's Appeal, 25 Penn. St. (1 Casey) 232.

ble in the same manner as if the Act of 1849 had never been passed." <sup>1</sup>

**§ 293. Where there is no waiver of exemption in the judgment** under which property is sold, the debtor can claim \$300 of the proceeds, even though there be a waiver of the exemption in other judgments against him. And the holders of the judgments containing no waiver can compel the creditors with waiver to resort first to the exempt fund for payment. <sup>2</sup>

**§ 294. A debtor cannot waive his right to the \$300 exemption in favor of a junior lien creditor,** nor can he assign it to a third person; whatever he does not regularly claim for himself remains in the fund, to be distributed according to law. <sup>3</sup>

**§ 295. The right must be claimed, silence construed as waiver.**—And if he desires to have the benefit of the exemption act he must claim it—if not, his silence will be construed as a waiver. Where a debtor's land was levied upon, and he claimed the exemption, and an appraisement was made, but no sale effected under that execution, and afterwards another creditor levied upon a part of the same land and sold it, without the debtor having given the notice upon the latter execution, it was held that he had waived his right. <sup>4</sup>

**§ 296. A stipulation in the condition of a bond waiving all law or laws** that would prevent the obligee, his heirs, executors, or administrators, from levying on and selling the obligor's property, is a waiver of the exemption law, and can be avoided only on the ground of fraud, accident, mistake, or some other equitable principle. <sup>5</sup> A waiver of

<sup>1</sup> Bowman v. Smiley, 31 Penn. St. 225.

<sup>2</sup> Pittman's Appeal, 48 Penn. St. 315.

<sup>3</sup> Bowyer's Appeal, 21 Penn. St. 210; Hill v. Johnston, 29 Penn. St. 362; Shelley's Appeal, 36 Penn. St. 373; Lanck's Appeal, 44 Penn. St. 395. See also Johnston & Sutton's Appeal, 25 Penn. St. 117.

<sup>4</sup> Dobson's Appeal, 25 Penn. St. 233.

<sup>5</sup> Smiley v. Bowman, 3 Grant's Cases 132.

claim of exemption is binding ; even if the debtor afterwards changes his mind, and makes claim thereto in due time, the waiver in the first instance formed part of the original contract.<sup>1</sup>

**§ 297. Waiver under one law is not a waiver under subsequent act.**—But where a defendant, in an execution issued upon a judgment for a debt contracted prior to the 4th July, 1849, consented to a levy on articles exempt by the Act of 1836, it was held competent for him to withdraw such consent before the day of sale, and that the officer selling such articles after notice of such withdrawal was liable for so doing.<sup>2</sup>

**§ 298. Waiver of inquisition no forfeiture of the right to claim exemption.**—When a defendant waives his right to an inquisition to condemn real estate levied on, and agrees that the sheriff may sell, he does not thereby forfeit his right of claiming the exemption of \$300.<sup>3</sup>

This waiver, or agreement to waive the exemption law, made when the debt is contracted, must be expressed in clear and precise language. Such an agreement cannot be inferred or conjectured.<sup>4</sup>

**§ 299. Exemption cannot be claimed where deed of assignment does not make reservation.**—Where a debtor assigns all his property for the benefit of his creditors, he cannot claim the exemption of \$300 out of such property, unless he expressly reserved the right in the deed of assignment.<sup>5</sup>

**§ 300. Agreement with debtor that he may retain part of land.** — But where a debtor gave a note in which he waived the \$300 exemption, and his land being af-

<sup>1</sup> Lanck's Appeal, 24 Penn. St. 426 ; Hoffman v. McDernwood, 1 Pitts 197.

<sup>2</sup> Hutchinson v. Campbell, 25 Penn. St. 273 ; Case v. Dunmore, 23 Penn. St. 93.

<sup>3</sup> Shaw's Appeal, 49 Penn. St. (13 Wright) 177.

<sup>4</sup> O'Nail v. Craig, 56 Penn. St. 161.

<sup>5</sup> Blackburn's Appeal, 39 Penn. St. R. 160.

terwards levied upon, he claimed the exemption, and the plaintiff, not relying on the waiver in the note, got the debtor to indorse another waiver on the writ, agreeing that if he would abandon his claim to the exemption he might retain part of the land—fifteen acres and the house: the Court held that this agreement was binding on the plaintiff, and that he was a trustee of the fifteen acres of land and the house.<sup>1</sup>

**§ 301. Waiver of the husband.**—A married householder cannot by any waiver consent to a sale of his homestead on execution so as to render the sale valid without the consent of his wife.<sup>2</sup>

**§ 302. Failure or neglect to file a declaration of homestead,** by either husband or wife, is a waiver of the homestead right in those States where, in order to secure the exemption, it is necessary to file such declaration.<sup>3</sup>

#### EASEMENT UPON THE HOMESTEAD.

**§ 303.** The power of the husband to grant right of way over the homestead without the wife's consent seems to be established by a late case in Iowa. The proposition, as heretofore generally understood and conceded, has been that the homestead should not only be protected from forced sale upon legal process, but that neither spouse could legally convey or incumber it, but it would seem that an easement is not to be regarded as affecting the title to the land, and that therefore the husband might grant a way over the homestead, so long as thereby he does not defeat the occupancy of it as such, upon the same principle that a husband having the control of the income from the homestead might lease such parts as

<sup>1</sup> *Beegle v. Wentz*, 55 Penn. St. (5 P. Smith) 369.

<sup>2</sup> *Fisher v. Meister*, 24 Mich. 447; *Yost v. Devault*, 9 Iowa 60; *Dye v. Mann*, 10 Mich. 291; *Alley v. Bay*, 9 Iowa 509; *Vanzant v. Vanzant*, 23 Ill. 536; *Williams v. Sweetland*, 10 Iowa 51; *Larsen v. Reynolds*, 13 Iowa 579.

<sup>3</sup> In the matter of the Estate of Reed, 23 Cal. 410; *Bartholomew v. Hook*, 23 Cal. 277.



were not in actual use by the family, or might farm out a part of it on shares. That he could alone grant an estate in it, even of the nature of an easement, which should be a permanent one and uncontrollable by the spouses, appears to be antagonistic to the general intentions of the framers of the constitutions and laws as to homesteads, but the latest ruling upon the point favors the right of the husband so to do.<sup>1</sup>

An easement and permanent use of certain portions of land, held as a homestead, may be acquired as against the homestead claimant.

Thus, where the owner of land, which is occupied as a homestead, has dedicated a part of such land as a public highway, and executed a release of all claim to damages, under seal, and for a valuable consideration; and such road was opened, used, and worked, the fee of the land still remaining in the grantor, the question of a homestead right in the land, by his surviving widow, cannot be raised. The objection that all the requirements of the statute, in dedicating, were not observed, can have no weight, when the owner himself initiated the proceedings, and every act therein was done with his knowledge and consent.<sup>2</sup>

And when a man conveys his homestead, and describes in the conveyance that the premises abut on certain streets, and covenants to permit such bounds to be used as streets, he cannot erect a building upon the spaces designated as streets, on the ground that the same remained part of his

<sup>1</sup> *Chicago & S. W. R. R. Co. v. Swenney*, 38 Iowa 182: "Can a husband grant a right of way to a railroad company over the homestead property, unless the wife concurs in and signs the conveyance? As applied to the circumstances of this case, we reply in the affirmative. The right of way is but an easement and does not pass the title; and in this case it does not, and is not claimed to, affect the substantial enjoyment of the homestead as such. If the homestead was a single lot, and the right of way occupied it all, so as to destroy the homestead or defeat its occupancy as such, the case would be very different. It cannot be doubted that if the husband, in this case, instead of cultivating the homestead himself should make a contract with his neighbor, or another, to cultivate it, or a part of it, upon shares, or for a fixed money rent, for one or for a series of years, such contract would be valid and binding, although the wife did not join or concur in and sign such a contract. And yet no one would claim that the husband could convey or make a permanent lease of the whole homestead without such concurrence by the wife." 38 Iowa 184.

<sup>2</sup> *Trickey v. Schlader*, 52 Ill. 78.

homestead, and had not been dedicated as streets. As to the grantees, and those claiming under them, the conveyance was a dedication of the streets named as public highways, and so vested in them, the grantees, a right of way as an appurtenance of the lot, and therefore free from the claim of homestead.<sup>1</sup>

<sup>1</sup> Kittle v. Pfeiffer et als., 22 Cal. 484.

## CHAPTER X.

## DIVORCE.

**§ 304. Another mode by which the homestead may be divested, as such, is by divorce of the husband and wife.**

The following doctrine is held in regard to lands held in joint tenancy by husband and wife, and the effect of a divorce between the parties on such estate. "It is laid down that, if husband and wife purchase," or acquire "an estate jointly, and are disseized, and the husband releases, and afterwards they are divorced, the wife shall have the moiety, though before the divorce there were no moieties, for the divorce converts it into moieties."<sup>1</sup> "This must necessarily be so; for although in such case the relation of husband and wife existed, de facto, at the time the conveyance was made to them, jointly or acquired, as common property; yet in contemplation of law, that unity of persons out of which this anomalous tenancy springs, and on which alone it depends as a mere incident, never did exist, and as some effect must be given to the conveyance," or acquisition, "the divorce is regarded as having severed the entirety and turned it into moieties. It would seem reasonable that this principle should be held equally applicable where a marriage lawfully contracted is dissolved by a divorce, for some supervenient cause, as frequently happens under our law, though its application is not so easy in such cases as where the marriage contract was void ab initio."

<sup>1</sup> Bright's husband and wife, 25, 162, 165, Id. 2, p. 364. As to the question of community interests of husband and wife on dissolution of the marriage by divorce, see *Eslinger v. Eslinger*, 47 Cal. 62; *Lord v. Hough*, 43 Cal. 581; *Wilson v. Wilson*, 45 Cal. 399; *Godey v. Godey*, 39 Cal. 157; *Eidenmuller v. Eidenmuller*, 37 Cal. 364. Under the laws of California, all property acquired after marriage is common property, as in Texas.

“If the rights of husband and wife in relation to an estate held by entireties are not altered by the decree declaring the divorce, what becomes of the joint estate? What are their respective rights in the future in regard to it? They are no longer one legal person—the law has made them twain. They are no longer capable of holding by entireties; the relation upon which that tenancy depends has been destroyed; the one legal person has been resolved by judgment of law into two distinct, individual persons, having in the future no relation to each other, and with this change of their relations must necessarily follow a corresponding change of the tenancy dependent upon the previous relation. As they cannot longer hold by joint seizin, they must hold by moieties. The law, in destroying the unity of persons between them, has by necessary consequence destroyed the unity of seizin, in respect of their joint estate, for independent of the matrimonial union this tenancy cannot exist.”<sup>1</sup>

**§ 305. Character of homestead, as such, may be lost by divorce.**—In the earlier decisions in California, the tenure of the homestead has been termed, as between husband and wife, a joint tenancy. It is said in the case of *Gimmy v. Doane*,<sup>2</sup> that there is only one way in which the homestead may lose its character as such, and that is by an order of Court in case of divorce of the husband and wife.

In such case, when the homestead may be partitioned or set apart to one of the parties in the same manner as the other common property of the spouses, and in case of such partition or setting apart of the property, where there are no children, such property will lose its character as homestead; certainly in the hands of a divorced husband, and presumed so in the hands of the divorced wife. This is the only way the joint tenancy—if such it may be called—in the homestead estate, as between husband and wife, can be terminated.

<sup>1</sup> *Ames v. Norman*, 4 Sneed (Tenn.) 695. See *Shoemaker v. Chalfant*, 47 Cal. 435.

<sup>2</sup> 22 Cal. 635. The same principle is maintained in Texas: Upon the death of householder, when no constituent member of the family remains, the homestead exemption ceases to exist; *Hoffman v. Neuhaus*, 30 Texas 633; *Sossaman v. Powell*, 21 Texas 664; *Burns v. Jones*, 37 Texas 50.

**§ 306. Decree and partition then liable for antecedent judgments.**—And when the homestead exemption is thus terminated by decree of Court dissolving the bonds of matrimony and decreeing partition of the homestead between the parties, such premises so partitioned become liable to be sold on execution issued on a judgment recovered prior to the decree of divorce and partition. Thus, where in 1871 certain premises became the homestead of husband and wife, and so continued up to the time when they were divorced, by a decree of Court, in 1873; the decree directed the homestead property to be equally divided between the husband and wife, partition having been had by the intervention of commissioners. The Court in confirming the same adjudged that the “respective portions allotted to each be held by them respectively, free and clear of all claims by or on the part of the other.” Subsequent to these proceedings, an execution issued on a judgment rendered against the husband, and that portion allotted to him was offered for sale by the sheriff. Upon suit to restrain the sale, it was held that the premises were liable, that “the decree severed the sort of joint tenancy of the parties in the homestead premises—it also destroyed the right of survivorship. The joint deed of both parties is no longer essential for the alienation or abandonment of any portion of the premises. The family, for whose benefit the provisions of the homestead act were mainly designed, was severed by the decree. All the principal qualities of the homestead estate, except that of liability for debts, etc., having been destroyed, the decree was as effectual in its results as would have been a declaration of abandonment.”

“It results from these views that the portion of the property which was allotted to the plaintiff was liable to execution for the payment of his debts.”<sup>1</sup>

**§ 307. Adultery, or various other acts of the parties, does not affect the right.**—The fact that the husband may have committed adultery will not operate as a forfeiture of his homestead right, where a forfeiture of his right would

<sup>1</sup> Shoemaker v. Chalfant, 47 Cal. 435; Hoyt v. Howe, 3 Wis. 660; Simmons v. Johnson, 14 Wis. 523.

also defeat that of his wife, and no act of his can have that effect. Where the householder and his family were residing upon premises at the time of their sale under execution, there being no release of the homestead right; subsequently, the wife obtained a decree of divorce, on the ground of adultery on the part of the husband. Held, that no forfeiture was incurred to prevent the assertion of the homestead exemption as against the purchaser, under the execution.<sup>1</sup>

The same principles obtain in Massachusetts. Upon the question whether the homestead right had been, or could be, extinguished by the various acts of the parties holding that estate, Dewey, J., said, in *Doyle v. Coburn*:<sup>2</sup> “Nor did the separation of husband and wife, as shown by her withdrawal in 1861, taking with her the child, defeat the homestead estate. The defendant has personally occupied the same as his place of residence up to the present time. He acquired his homestead as a ‘householder having a family.’ It is not necessarily lost by the death or absence of his wife and children. Others may be adopted as members of his household, and his homestead retain its existence.”

“Nor does the withdrawal of the wife, under a decree for a divorce from bed and board, obtained on her application, and the assignment to her of the custody of the child, defeat the husband’s right of homestead, he continuing to occupy it as such.”

**§ 308. A sale on execution under the decree** would not defeat the homestead right, inasmuch as it is exempt from execution; and it is immaterial that the wife assented to such sale, or that it was for her benefit. Any such sale would be illegal, and would not affect the homestead.<sup>3</sup>

Where a decree was entered, divorcing a husband and wife, and giving the wife a general judgment only for alimony, leaving the husband the head of the family, consisting of himself and several minor children, it was held that a homestead,

<sup>1</sup> *Blue v. Blue*, 38 Ill. 10; *Redfern v. Redfern*, 38 Ill. 509; *Byers v. Byers*, 21 Iowa 268; *Woods v. Davis*, 34 Iowa 265.

<sup>2</sup> 6 Allen 71.

<sup>3</sup> *Id.* 6 Allen 73.

acquired and occupied as such, was exempt from sale to satisfy such judgment for alimony. Whether the Court, in rendering a decree of divorce, can set apart the homestead to the wife, either absolutely or for a limited period, or can make the judgment for alimony a lien thereon—leaving the husband the head of the family—is a question not decided.<sup>1</sup>

**§ 309. Custody of the children given to mother after divorce, not thereby head of family, and entitled to the homestead.**—In the same State, it is held that, when a wife has obtained the custody of the children, after a divorce from the husband, she does not thereby become the head of the family on the ground that the decree awarding to her the custody of the child, or children, does not exonerate the husband from the liability to support the same in the event of the inability of the mother to do so. It seems fully to accord with the provisions of the homestead law, that the exemption should last as long as his liability for support exists, provided he continue in the actual occupation of the property. Besides, the homestead law is intended for the benefit of the children as well as of the parents. “It does not accord with the spirit of the humane provisions of the statutes, that the divorcing of the wife, and awarding to her of the children, should deprive them of all interest in the homestead property.”<sup>2</sup>

**§ 310. A contrary, and what appears to be a more humane and equitable rule,** obtains in Illinois and in Texas. Where the wife of a party having a homestead right obtains a divorce from him, she being “the meritorious cause thereof,” and the custody of their child being committed to her, she becomes the head of the family, and the homestead right passes to her as such by the operation of the statute. “In fact, she holds it by the double right, as alimony by a decree of Court, and as her homestead by the operation of the statute.”

<sup>1</sup> Byers v. Byers, 21 Iowa 268. See Brandon v. Brandon, Sup. Ct. Kan., Am. L. Reg., July, 1875, (N. S. Vol. 14, No. 7).

<sup>2</sup> Woods v. Davis, 34 Iowa 264; Byers v. Byers, 21 Iowa 269. As to the question of liability of husband to support child after divorce, when wife awarded the custody of child, see Wilson v. Wilson, 45 Cal. 399; Brandon v. Brandon, Sup. Ct. Kan., Am. L. Reg., July, 1875.

**§ 311. Nor will the wife forfeit her homestead right if she leaves during coverture on account of her husband's cruelty. She may be said to leave under moral compulsion.<sup>1</sup>**

**§ 312. Nor does the death of the wife after the divorce in such case operate to destroy the homestead right, her child being still alive, because the statute secures it to the child until it attains the age of twenty-one years.<sup>2</sup>**

**§ 313. Where the husband obtains a divorce from the wife, there being minor children of whom he has the care and custody, the divorce does not change his position : he still remains the head of the family and is entitled to occupy the homestead as such. And whatever right the wife may have in the homestead it is subordinate to the right of the husband while he lives, and continues to be the head of the family and to occupy the premises. So, after a divorce between the husband and wife, if the latter acquires the fee in the premises constituting the homestead from the grantee, in a deed executed by her and her husband prior to the divorce which did not operate as a release of the homestead right, she will hold subordinate to her husband's right of homestead, there being minor children of whom he retains the care and custody.<sup>3</sup>**

**§ 314. In Texas, the rule is, that where a divorce is obtained by husband or wife, the spouse to whom the care of the children is awarded by the Court becomes the head of the family, and, as such, becomes entitled to the use of the homestead for life.<sup>4</sup> The same rule prevails in Kansas. In the case of *John Brandon v. Mary Ann Brandon*,<sup>5</sup> the plaintiff was granted a divorce on account of the fault of**

<sup>1</sup> *Vanzant v. Vanzant*, 23 Ill. 536 ; *Tieman v. Tieman*, 34 Texas 524 ; *Redfern v. Redfern*, 38 Ill. 509.

<sup>2</sup> *Bonnell v. Smith*, 53 Ill. 377 ; Stat. of Ill. 1871 and '72.

NOTE.—By the statutes of Ill., Laws 1871 and '72, p. 478, Sec. 5, it is provided that "in case of divorce, the Court granting the divorce may dispose of the homestead estate according to the equities of the case."

<sup>3</sup> *Redfern v. Redfern*, 38 Ill. 509.

<sup>4</sup> *Tiemann v. Tiemann*, 34 Texas 522.

<sup>5</sup> Sup. Ct. Kansas, Am. L. Reg., July, 1875, Vol. 14, (N. S.) No. 7.



the defendant on the charge of habitual drunkenness, but the Court awarded the defendant the care, custody, nurture, and education of the two minor children of the plaintiff and defendant, one three and a half years old and the other one year old. The decree provided that the defendant should have and retain the possession of the homestead of the plaintiff during her natural life, and that the plaintiff should forthwith deliver possession of said premises to said defendant, and that the plaintiff should pay as further alimony the sum of twenty-five dollars per month to the defendant. Upon appeal to the Supreme Court by the plaintiff, it was held: 1st. That "the fact that the title to the homestead property is in the husband does not give him any greater interest in it as a homestead"; "in so far as it is homestead, it is the homestead of each, and upon divorce the Court has the power to assign it to either." "The assignment of the homestead to the wife is within this power" granted to the Courts. "And the constitutional grant of power to divorce is broad enough to include the power to determine the subordinate and dependent questions of the family property and the care and custody of the children. In this case we have only the question of power to determine, for as the testimony is not before us, we are unable to form any opinion as to the propriety of the assignment of the homestead to the wife." 2d. Held, that the Court could not say it was error on the part of the Court below in awarding "the custody of the children to one found to be an habitual drunkard" (in the absence of the testimony in the case). "The children were of tender years, and needed a mother's care of them during their infancy." "So far as the amount of alimony is concerned, we suppose it was intended for the benefit of the children rather than of the wife. We, however, are not prepared to say that it was exorbitant, when the custody and care of the children are taken into account."

**§ 315. When a husband, in fraud of his wife's rights, and in collusion with a third person, conveys his homestead premises to the latter, without his wife's consent and signature, he loses all claim to the premises as homestead, as far**

as he is personally concerned ; and therefore he cannot deny fraud in the conveyance, on the ground that, as a homestead, the land was not subject to sale on execution for alimony in an action of divorce maintained against him by his wife.

If he had not made such fraudulent conveyance, it is doubtful whether the land could have been sold in execution for the alimony in the divorce suit ; but the wife's remedy would have been to have a portion of the homestead premises set off to her, and title thereto passed to her by the decree in the suit.<sup>1</sup>

**§ 316. In Pennsylvania,** where a judgment of divorce has been pronounced and death ensues, the survivor cannot claim under the exemption laws any portion of the property left by the decedent. In every case, to entitle the survivor to participate in the benefits of the exemption law, the family relation must exist at the time of death ; or if it does not actually exist, through desertion or some other cause, it must exist in contemplation of law, as the purpose of the law is a provision for the wants of the family.<sup>2</sup>

<sup>1</sup> *Barker v. Dayton*, 28 Wis. 367.

<sup>2</sup> *Hettrick v. Hettrick*, 55 Penn. St. 290.

## CHAPTER XI.

## DESCENT AND PROBATE.

**§ 317. General statement**—The death of one of the spouses does not, in many of the States, alter in any way the estate or title of the homestead. If the homestead had been the separate property of either, or the common property of both, before the homestead character attached, it still remained such separate or common property, subject to the right of occupancy by the survivor and minor children.<sup>1</sup>

**§ 318. The survivor takes the title absolutely**, in other States, and again, in others, it descends to the wife and children jointly, if there be any children ;<sup>2</sup> if not, the fee-simple estate vests in the widow, and upon her death descend to her heirs, lineal and collateral, and not to the heirs of the husband.<sup>3</sup>

Thus, in Missouri, one Wood, at the time of his death, held a homestead in certain premises, of which he was the owner in fee-simple absolute. Subsequently the widow was allowed, as a homestead, 120 acres of the estate of her deceased husband. “The deceased left no minor children, but had several children by a former wife, who were of age, and married. One of the married daughters filed in the Circuit Court a petition to enjoin the defendant widow from wasting the timber on the 120 acres so set apart. “A temporary injunction was granted, and ultimately this injunction was made final.”

<sup>1</sup> *Size v. Size*, 24 Iowa 580 ; *Johnson v. Bush*, Cal. S. C., Oct. Term, 1874, to appear in 49 Cal. ; *Meador v. Place*, 43 N. H. 307 ; *Myer v. Myer*, 23 Iowa 359 ; *Hamblin v. Warnecke*, 31 Texas 91 ; *Bassett v. Mesner*, 30 Texas 604 ; *Colton v. Wood*, 25 Iowa 43 ; *Burns v. Kess*, 21 Iowa 207.

<sup>2</sup> *Wixom's Estate*, 35 Cal. 320 ; *Rich v. Tubbs*, 41 Cal. 34 ; *Comp. L. Ill.* 1871 and '72, p. 478, Sec. 2.

<sup>3</sup> *Doane v. Doane*, 33 Vt. 652 ; *Skouton v. Wood*, 57 Mo. 380.

The question was, whether the homestead of the wife, assigned to her by the Probate Court, was a life estate or a fee-simple.

The statute under which this case was decided reads as follows :

“If any housekeeper or a head of a family shall die, leaving a widow or any minor children, his homestead, to the value aforesaid, (\$1,500) shall pass to and vest in such widow or children, or if there be both, to such widow and children, without being subject to the payment of the debts of the deceased, unless legally charged thereon in his lifetime ; and such widow and children, respectively, shall take the same estate therein of which the deceased died seized, provided, that such children shall, by force of this chapter, only have an interest in such homestead until they shall attain their majority ; and the Probate Court having the jurisdiction of the estate of such deceased housekeeper or head of a family, shall, when necessary, appoint three commissioners to set out such homestead to the person or persons entitled thereto.”

It was held in this case that, there being no minor children, the widow took the estate absolutely ; “and on her death it goes to her heirs, lineal or collateral, to the exclusion of the husband’s heirs.” \* \* \* “The law declares her title to be the same as her husband had, and as he had a fee-simple, she enjoys the same, and can dispose of it as she pleases ; and on her death without such disposition, it would necessarily go to her heirs, to the exclusion of her husband’s children, who were at maturity at his death.” “As the widow in this case took a fee, there was no ground for an injunction by the heirs of the husband ; and as the statute declares she shall take a fee where her husband had one. The Circuit Court erred, therefore, in granting any injunction, and its judgment is reversed.”<sup>1</sup>

<sup>1</sup> Skouton v. Wood, 57 Mo. 382 ; Day v. Adams, 42 Vt. 510 ; Simonds v. Powers, 28 Vt. 354 ; Keyes v. Hill, 30 Vt. 759 ; Doane v. Doane, 33 Vt. 652 ; Davis v. Andrews, 30 Vt. 678 ; McClary v. Bixby, 36 Vt. 257.

The Supreme Court of Missouri, in deciding this case, followed the decisions of Vermont, wherein it is held that the widow takes the fee absolutely ; the Missouri statute being a literal copy of the Vermont statute on the same subject : “Homestead right in widow a right in fee, and descends to her heirs.” Doane v. Doane, 33 Vt. 652.

**§ 319. General statement of the right in California.**—In California, under the homestead laws of 1851, in a series of early decisions up to the year 1859, the Supreme Court of that State uniformly held the theory that the husband and wife were quasi joint tenants of the homestead.<sup>1</sup> In a subsequent series of decisions by Field, C. J., under the same statute, the theory of a joint tenancy on the part of the husband and wife is rejected, and the theory is maintained that the right of homestead did not change the nature of the prior estate in the land; whether it was the separate property of the husband or the common property of both husband and wife, it continued to remain such common or separate property.<sup>2</sup> This latter view was unpopular, and the legislature, in the following year, 1860, passed an act by which it was declared “that the husband and wife shall hold the homestead property as ‘joint tenants,’ and that upon the death of the husband or wife the homestead shall be set apart for the benefit of the survivor and his or her legitimate children.” Thus restoring by legislation the interpretation of the Court of the Act of 1851, which had obtained up to the year 1859. Subsequently, by the amendatory act of 1862, the children of the deceased husband or wife do not inherit any interest in the homestead, but it vests absolutely in the survivor. By the Codes adopted in 1873, (Civil Code, Sec. 1474) the provisions of the Act of 1862 are continued in force.

**§ 320. If the wife dies leaving husband and children the homestead is inherited by the husband,** and vests in him absolutely, but the premises retain their homestead character for the protection of the family, that is to say, for the protection of the children, who, however, take no other interest in the estate;<sup>3</sup> but if the wife dies leaving no issue

<sup>1</sup> *Taylor v. Hargous*, 4 Cal. 273; *Poole v. Girrard*, 6 Cal. 71; *Dorsey v. McFarland*, 7 Cal. 342; *Revalk v. Kraemer*, 8 Cal. 66; *Dunn v. Tozer*, 10 Cal. 167; *Lies v. Diablar*, 12 Cal. 327; and others.

<sup>2</sup> *Gee v. Moore*, 14 Cal. 472; *Guiod v. Guiod*, 14 Cal. 506; *Harper v. Forbes*, 15 Cal. 202; *Bowman v. Norton*, 16 Cal. 213; *Brennan v. Wallace*, 25 Cal. 108; *McQuade v. Whally*, 31 Cal. 526.

<sup>3</sup> *Estate of Buchanan*, 8 Cal. 507; *Estate of Wixom*, 35 Cal. 320.

living, the property in the hands of the husband loses its homestead character and becomes answerable for his debts.<sup>1</sup>

**§ 321. When the husband dies leaving a widow, or a widow and children,** surviving him, the homestead vests absolutely in the widow, free from all debts of the deceased, and it then becomes the duty of the Probate Court to set the homestead apart for her use.<sup>2</sup> The surviving wife only inherits the actual statutory homestead, that is, the dwelling-house and sufficient land to be worth \$5,000, and this clear of all incumbrances upon it, out of the proceeds of the husband's estate, should there be sufficient assets for that purpose.<sup>3</sup>

**§ 322. Where no homestead had been selected or acquired** during the lifetime of the spouses, the widow is entitled to have a homestead set apart to her by the Probate Court out of the husband's property.<sup>4</sup>

**§ 323. Property susceptible of dedication after death.** Previous to the adoption of the Codes in 1873, the premises set apart to the widow must have been such as were susceptible of dedication to homestead uses during her husband's life. Thus, premises held during the lifetime of the husband as partnership assets, and assigned to his estate on the partition of the real estate of the firm, could not be assigned to the widow of the deceased member of the firm, not even though she and her husband had been residing on the premises during his life.<sup>5</sup>

But under Sec. 1482 of the Code, on petition, the Court is authorized to set apart for the use of the widow a homestead in any lands owned by the decedent as joint tenant or tenant in common, and order partition thereof, by action in the proper Court, and when so partitioned, to be recorded as such homestead, and not to exceed in value \$5,000. And when

<sup>1</sup> *Revalk v. Kraemer*, 8 Cal. 72; since changed by statute. *Benson v. Aitken*, 17 Cal. 163.

<sup>2</sup> *Estate of Buchanan*, 8 Cal. 507; *Estate of Wixom*, 35 Cal. 320.

<sup>3</sup> *Estate of Delany*, 37 Cal. 176.

<sup>4</sup> Code of C. P., Sec. 1481; *Estate of Busse*, 35 Cal. 315.

<sup>5</sup> *Estate of Isaacs*, 30 Cal. 113; *Kingsley v. Kingsley*, 89 Cal. 665.

partition cannot be had of the specified value, and a sale is ordered, the proceeds of the sale to the amount of \$5,000 are to be paid to such claimant.

**§ 324. Widow after second marriage entitled to two homesteads.**—A widow to whom the Probate Court has set apart a homestead out of the estate of her deceased husband, may, if she afterwards marries, claim a second homestead under the general homestead act, in the estate of her second husband.

In the case of *Higgins v. Higgins*,<sup>1</sup> the plaintiffs were the children of one of the defendants, Solomon Higgins, by his first wife, Hulda, who acquired the title to the land in controversy; “that the purchase-money was paid out of the common property of the marriage; that at request of the husband, and by way of gift from him, and with the intention on his part that the same should become her separate estate, the property was conveyed directly from the grantor to the wife, by bargain and sale deed.”<sup>2</sup> That the wife “afterwards died intestate during the lifetime of the husband, leaving the plaintiffs as her heirs at law; that the husband subsequently intermarried with the defendant, Ann Higgins; that thereafter, and whilst residing on the premises with her husband, the said Ann duly filed and recorded a declaration claiming said premises as a homestead; after which her husband, Solomon Higgins, by a deed reciting love and affection as the consideration, conveyed the premises to his daughter, Mrs. Goldstone, one of the plaintiffs; and that ever since the filing of the declaration of homestead, the defendant, Ann Higgins, has resided upon, and claimed, and used said premises as a homestead.” “The whole title, therefore, legal and equitable,

<sup>1</sup> 46 Cal. 259, 263; see *Miles v. Miles*, 46 N. H. 261.

<sup>2</sup> It is a well-settled rule in California, that if a husband purchases an estate, and pays for it out of the common property, and causes it to be conveyed to the wife by a deed of bargain and sale, (provided it is not done in fraud of creditors) with the intent that it become her separate estate, the transaction will operate and be upheld as a gift from the husband to the wife.

*Peck v. Brummajim*, 31 Cal. 440; *Dow v. G. & C. G. & S. M. Co.* 31 Cal. 653; *Ingersoll v. Trubody*, 40 Cal. 603; *Woods v. Whiting*, 42 Cal. 359; *Higgins v. Higgins*, 46 Cal. 263; *Rhine v. Ellen*, 36 Cal. 362; *Ramsdel v. Fuller*, 28 Cal. 37.

is in the plaintiffs, unless the operation of the deed from Solomon Higgins to his daughter has been defeated by the homestead claim filed by the defendant, Ann Higgins." Solomon Higgins and his wife, the defendant, Ann Higgins, intermarried on the 4th of February, 1870—she being the widow of John Jones, deceased—and that on the 15th of the same month, eleven days after her marriage with Higgins, the Probate Court, by a proper decree, set apart to her, as the widow of Jones, as a homestead for the use and benefit of herself and the children of her marriage with Jones, of whom there are four; that the decree was duly recorded and in full force. There are no children of the second marriage."

"Whether the wife, under these circumstances, can claim a homestead in the estate of her second husband, is a novel question, for the first time presented to the Court."

"It is said that, if she can claim both, she will be protected in the enjoyment of two homesteads at the same time—a result which, it is claimed, was not contemplated by the statute."

But it is to be observed, that the homestead to be set apart under the Probate Act, for the use of the widow and the minor children, is a mere reservation out of the property of the estate for their benefit, and is for the use of the minor children as well as the widow.

"Under the general homestead act, however, the homestead goes to the wife alone, if she survives the husband, and the children by a former marriage would have no interest in it, while the children of her last marriage would have no interest in a homestead set apart from the estate of her first husband."

"Looking to the policy which dictated the two classes of homesteads, we think that the fact that a homestead had been set apart from the estate of her former husband for the use of Mrs. Higgins and her minor children, did not estop her from claiming a homestead out of the estate of her second husband. On the death of his former wife, intestate, Solomon Higgins succeeded, under the statute of distributions and descents, to one-third of the property, and the other two-thirds descended to the plaintiffs as heirs at law of the



mother. The only interest in which Mrs. Higgins could assert the right of homestead was the one undivided third part of the property derived by her husband for the deceased wife, and that an amount not exceeding \$5,000 (Act March 9th, 1868) she was entitled to take up a homestead claim on his undivided one-third interest, and after the homestead claim was perfected, the husband, by his sole conveyance, could not defeat it."<sup>1</sup>

In another case, (decided in 1872) the same Court held that: "If a widow who is entitled to a homestead" under Sections 121 to 125 of Probate Act in relation to homesteads, "again marries before an order of the Probate Court is made setting apart such homestead, she loses by her marriage the right to such homestead."<sup>2</sup>

**§ 325. In New Hampshire, it is held that by a second marriage a widow does not lose her right of homestead, whether it be assigned to her before such marriage or not; the reason assigned being, that the policy of the law is against restraint upon marriage.<sup>3</sup>**

**§ 326. In California, where there has been no homestead created during the existence of the community, by a compliance with the homestead act, the widow can acquire no homestead interest in the property under the foregoing sections of the homestead act, until an order of the Probate Court, or judge, has been made setting it apart to her.<sup>4</sup>**

Nor does the Court acquire jurisdiction to so set apart a homestead for the surviving wife, when no homestead has

<sup>1</sup> Id. p. 266.

<sup>2</sup> Estate of Boland, 43 Cal. 642; Anderson v. Coburn, 27 Wis. 558. It will have been seen that this case of Boland and that of Higgins v. Higgins, just cited at length, are in conflict in relation to setting aside a homestead for the use of the widow after her second marriage. Yet both decisions arose virtually under the same statute, and the same judges participated in both decisions. But the question of allowing a homestead by the Probate Court to Mrs. Higgins as widow of Jones, did not arise in the former case, and the question was not necessary to the decision.

<sup>3</sup> Miles v. Miles, 46 N. H. 261. See Anderson v. Coburn, 27 Wis. above, contrary rule.

<sup>4</sup> Estate of Boland, 43 Cal. 642.

been selected before the death of the husband, unless a petition therefor is filed.<sup>1</sup>

**§ 327. Action of the Probate Court does not affect the title.**—The setting apart for the use of the family of the deceased husband or wife, property which had been dedicated as a homestead under the homestead act, does not change or transfer the title ; nor does it adjudicate the question of title. The only effect of such order of the Probate Court is to relieve the property from administration, and that it does not constitute assets of the estate of the deceased.<sup>2</sup>

**§ 328. Acquiescence of the widow in homestead set apart for a length of time is conclusive.**—When the widow has had the homestead set apart to her, and has acquiesced in the order so setting it apart, such acquiescence is final and conclusive, and she will not be permitted afterwards to successfully petition the Court to set apart another homestead in lieu of the one she had originally petitioned for, because she thinks she has not chosen the most advantageous piece of her husband's property.

Thus, where a widow who had applied to the Probate Court to have the last residence of herself and husband set aside as a homestead, and had acquiesced for eighteen months in the order setting it aside, it was held that she was concluded by her own act from afterwards claiming a lot on which she and her husband had formerly resided, merely because she had ascertained there were liens on the lot first set aside.<sup>3</sup>

**§ 329. Omitting to file declaration in time, rights of creditors.**—Where, by an amendment to the homestead law, those who would avail themselves of the exemption were required to file a declaration of such intention to claim and hold such homestead on or before a certain day named, and where a householder died before the time expired allowed by

<sup>1</sup> *Cameto v. Dupuy*, 47 Cal. 79.

<sup>2</sup> *Rich v. Tubbs*, 41 Cal. 35 ; *Schadt v. Heppe*, 45 Cal. 433.

<sup>3</sup> *Holden v. Pinney*, 6 Cal. 234.

law, and no claim of homestead was filed. It was held that his widow could not claim a homestead against the husband's creditors, unless the declaration was filed before the time appointed by statute expired.<sup>1</sup>

#### DESCENT TO HEIRS OF HOMESTEAD ESTATE.

**§ 330.** The law in relation to the descent of the homestead property after the death of one or both of the spouses, or by the death of one and the abandonment of the premises by the other, has repeatedly received interpretation by the Courts in California and Texas. In the recent case of *Johnson v. Bush*,<sup>2</sup> which arose in California under the Homestead Act of 1851, where the homestead property in controversy was the common property of Eaton and wife, and was occupied by them until her death in 1859, Crockett, J., in delivering the opinion of the Court, thus announces the rule in relation to the fee of the land :

“The dedication of the land as a homestead, under the Homestead Act of April 21st, 1851, did not constitute the husband and wife joint tenants, with a right of survivorship, nor change the nature of their prior estate in the land, and had no other effect than to exempt it from alienation so long as the homestead claim was impressed upon it, except by the joint deed of the two spouses.<sup>3</sup> ‘The power of alienation, and not the nature of the estate, is thus affected. If the premises are the separate property of the husband, or the common property of both the husband and wife before they become a homestead, they remain such separate or common property afterwards.’ It is clear, therefore, that if the home-

<sup>1</sup> *Estate of Reed*, 23 Cal. 410, under amendment to Homestead Act of June 1, 1862 ; see different rule under Act of 1860 ; *Cohen v. Davis*, 20 Cal. 187 ; *Noble v. Hook*, 24 Cal. 638 ; *Finley v. Deitrick*, 12 Iowa 519 ; *Kelly v. Baker*, 10 Minn. 154.

<sup>2</sup> Cal. S. C., Oct. Term, 1874—not yet reported. In *Pacific L. Rep.*, Nov. 10, '74, to appear in 49 Cal.

<sup>3</sup> *Gee v. Moore*, 14 Cal. 474 ; *Bowman v. Norton*, 16 Cal. 213 ; *Himmelmann v. Schmidt*, 23 Cal. 117 ; *Brannan v. Wallace*, 25 Cal. 114 ; *McQuade v. Whalley*, 31 Cal. 531.

stead claim was terminated by the death of the wife, her interest in the property immediately vested in her children, who became tenants in common with their father, and were entitled to be let into possession with him.<sup>1</sup> On the other hand, if the homestead claim survived to the husband as the head of the family, (a point not decided) nevertheless, the children were not thereby deprived of the interest in the common property which they had inherited from their mother, and which they held, subject only to the homestead claim of their father. When the claim was abandoned, or for any reason ceased to exist, the right of the children became absolute, and entitled them to the immediate possession of their undivided interest in the property. If it be conceded, therefore, that Eaton, after the death of his wife, was entitled to occupy the land as a homestead, he held it as such subject to the rights of his children as the owners of an undivided half of the property, and whose right to be let into possession would become absolute on the termination of the homestead claim. In 1865, Eaton removed from these premises, and in 1867 conveyed them to the defendant by deed absolute. This was clearly an abandonment of the homestead, and the plaintiffs, who are the children of the deceased Mrs. Eaton, became entitled to enter. We attach no importance to the fact that, in 1861, after his second marriage, Eaton filed a declaration of homestead, including these premises, under the Homestead Act of 1860. He could not deprive his children of their estate by an attempt to dedicate property as a homestead for himself and his second wife under the new law, which establishes a sort of joint tenancy in the homestead, with a right of survivorship, between husband and wife."

Such inheritance is regulated by the law in force at the time of the death.<sup>2</sup>

<sup>1</sup> *Broad v. Broad*, 40 Cal. 493; *Broad v. Murray*, 44 Cal. 228; *Folsom v. Carli*, 5 Minn. 337.

<sup>2</sup> *Rich v. Tubbs*, 41 Cal. 35; *Schadt v. Heppe*, 45 Cal. 433. To the same effect, *Hartman v. Thomas*, 37 Texas 90; *Walker v. Young*, 37 Texas 519; *Bell v. Schwarz*, 37 Texas 572; *Magee v. Rice*, 37 Texas 502; *Jones v. Jones*, 15 Texas 140; *Tadlock v. Eccles*, 20 Texas 782; *Brewer v. Wall*, 23 Texas 585; *Burleson v. Burleson*, 28 Texas 418; *Sosseman v. Powell*, 21 Texas 666; *Good v.*

## DESCENT AND PROBATE IN TEXAS.

**§ 331. The laws governing the homestead property on the death of one of the spouses in Texas, as interpreted by the tribunals of that State, are very similar to those of California, especially under the Act of 1851 of the latter State. The laws relating to rights of husband and wife, of community property, of descents and distributions, are alike.**

The statute of Texas provides that "all property exempt from execution shall be set apart for the use of the widow and children."<sup>1</sup>

The Supreme Court of Texas, in discussing the second section of the statute of 1848, in relation to this subject, says: "There is no distinction in terms between minor and adult children, nor was there any in the like provisions in the statutes of 1843 and of 1846. If we are to consider the policy and object of the legislature, the conclusion would be that the family should be secured in the home of the deceased, whether the family consisted of a widow, or children, or either, or whether the children at home be adults or minors."<sup>2</sup>

But a different view was taken subsequently in the case of *Hoffman v. Newhaus*,<sup>3</sup> in which Morrill, C. J., said: "The constitution of this State and the laws made in obedience thereto, after defining a homestead, secure it to the family. When children arrive at the age of majority, and especially when they leave the family of their father and mother, and become a separate family, they are no longer any part of the old family. They can acquire a homestead of their own which will be secure from all interference. The homestead cannot be divided out, for that would partially destroy it, and thus plainly violate its sacred character. As long as

*Coombs*, 28 Texas 50; *Cooper v. Singleton*, 19 Texas 267; *Walker v. Howard*, 34 Texas 478.

<sup>1</sup> See Paschal's Digest, L. 1843, 1846, 1848, 1866, and 1870, and Const. 1866.

<sup>2</sup> *James v. Thompson*, 14 Texas 466; *Green v. Crow*, 17 Texas 180; *Lockhart v. White*, 18 Texas 102.

<sup>3</sup> 30 Texas 633.

there is a family having a head, and as long as this head chooses to occupy the homestead, it cannot be interfered with for any purpose." "The statute requires the Chief Justice (of the county) to set apart for the use and benefit of the widow and children what is exempt from execution." "The homestead cannot be divided, as the proviso in the section shows, which expressly requires that nothing in the act shall be so construed, if the estate is not insolvent, as to prohibit the distribution and partition of said estate among the heirs and distributees thereof, including the portion designated and set apart to the widow, excepting the one year's provision. As the heirs of a deceased person who has children are these children, and as a distinction is drawn between the heirs and the widow and children, the word children must be construed to mean minor children, and it is for these minor children and the head of the family, whether that head of the family consists of father, or mother, or guardian, that the homestead is reserved." And the law will protect them in the enjoyment of their right from the interference either of the heirs at law or the general creditors. Upon the death of the husband, the widow takes to her sole use one-half of the property exempt in the lifetime of her husband, and the other half she holds for the benefit of the children of the marriage.<sup>1</sup> Even if the Probate Court had not been by any law invested with authority to designate for the use of the widow of the deceased the property which in his lifetime had been exempt from execution, yet such property would, in the possession of the widow, be exempt from execution or forced sale. During the existence of the marriage the husband was the head of the family, but on its dissolution by death the surviving wife was placed in that position, and in such position she has all its incidents, rights, and privileges. The same of the husband on the death of the wife. The right of either as the head of a family to retain the property exempt from execution is perfect, and the right of one is entirely equivalent to that of the other, and is neither of a higher, or lower, or different, but of the same

<sup>1</sup> Wood v. Wheeler, 7 Texas 21.

grade, nature, and force. Husband and wife are not one, under the laws of Texas. The existence of the wife is not merged in that of her husband, as far as the rights of property are concerned—they are distinct persons as to their estates. “They are co-equals in life, and at death the survivor, whether husband or wife, remains the head of the family.”<sup>1</sup>

**§ 332. Where no constituent member of the family remains the homestead exemption ceases.**—The rule seems now to be well settled in Texas—although formerly an apparently different rule obtained—that where no constituent member of a family remains, the homestead exemption ceases to exist, and the property becomes subject to the debts of the last owner, notwithstanding he left children or descendants, who were not members of his family at the time of his death.<sup>2</sup>

**§ 333. It vests in the heirs with or without administration.**—Where the homestead property of the deceased tenant had been illegally disposed of, as by the husband without the consent of his wife, the heirs have rights therein apart from any which they might claim through an administrator. It vests in the heirs with or without administration, and cannot be converted to the use of the creditors.<sup>3</sup>

**§ 334. Death of wife without issue, husband retains homestead.**—Where a man and his wife acquired a homestead, and the wife died, leaving no issue, the husband continued to occupy the premises as before with his slaves, hirelings, etc. His niece and her husband came to live with him after the wife's death, and it was held that the homestead right continued under the constitution, that the death of the wife did not destroy its distinctive character as a homestead, and if he had been without servants or any one with him after the death of his wife, it would still have been his homestead as long as it continued to be his residence.<sup>4</sup>

<sup>1</sup> 7 Texas 19.

<sup>2</sup> Burns v. Jones, 37 Texas 50 ; Hoffman v. Neuhaus, 30 Texas 633 ; Sossaman v. Powell, 21 Texas 664.

<sup>3</sup> Norris v. Duncan, 21 Texas 594 ; Sossaman v. Powell, 21 Texas 664.

<sup>4</sup> Wood v. Wheeler, 7 Texas 13 ; Taylor v. Boulware, 17 Texas 77.



**§ 335. Homestead right does not survive if separate property.**—The Court has decided that the “homestead right” of the wife does not survive after her death, so as to vest a homestead right in the children of the marriage—if there be any. After the death of the wife the husband may sell the homestead, if it be separate property; the children having no interest in the homestead which restricts the father’s right to sell.<sup>1</sup> Sec. 22 of Article 7 of the Constitutions of 1845 and 1866, in speaking of the homestead exemption, says: “Nor shall the owner, if a married man, be at liberty to alienate the same—homestead—without the consent of the wife.” Which language the Court interprets as “clearly implying that if the owner be not a married man he shall have the power to alienate the homestead.”<sup>2</sup>

**§ 336. Allowance to minor heirs, where homestead subject to deed of trust.**—Where on the 23d of March, 1867, M and wife owned and occupied a homestead in B county, and on that day M conveyed a lot in Galveston to a creditor to secure a debt. In the fall of 1867, M and his family moved upon his lot in Galveston, and occupied it as a homestead until the death of M, whose widow and minor children continued to occupy the lot as a homestead until the widow also died. The estates of M and wife were insolvent, and they left no other real estate than the lot in Galveston. Held, that as M and wife, at the execution of the deed of trust, occupied as their homestead other land than the lot in question, their homestead right attached to the lot—if it attached at all—subject to the deed of trust; but that the minor children of M and wife were entitled, in preference to the deed of trust, to an allowance in lieu of homestead, to be raised by the sale of the lot by the administrator—the overplus above the allowance of the minor children to be applied to the deed of trust which had been presented to the administrator duly probated.<sup>3</sup>

<sup>1</sup> *Tadlock v. Eccles*, 20 Texas 782.

<sup>2</sup> *Brewer v. Wall*, 23 Texas 585.

<sup>3</sup> *Botts v. Scott*, 37 Texas, 59.



**§ 337. Adult children living apart, not entitled to homestead in land subject to deed of trust.**—Thus where in April, 1860, R and his wife duly executed a deed of trust upon their homestead to secure indorsers on their notes. In 1863, R died insolvent, and his wife subsequently died in 1866, insolvent. Soon after the death of the latter, their son, who was then of full age, left the property, and never afterwards resided upon it; and in 1867, two daughters, the only children of R and wife, married and acquired other homes. The indorsers paid the notes, and brought suit against the children and heirs of R and wife, to enforce the deed of trust. Held, that the plaintiffs were entitled to have the trust enforced, the property sold, and to reimbursement out of its proceeds. As the defendants did not remain together as a family, nor continue to occupy the property as a homestead, they can only take it subject to the incumbrance of the deed of trust. Had they been minors remaining together, and occupying the property as a homestead, or if a surviving widow, the head of a family, was the party defendant, the question presented would be a different one.<sup>1</sup>

**§ 338. Disposition of husband of his community interest—Partition.**—A surviving husband may, after the death of his wife, dispose of his community interests in the homestead, regardless of the children of the marriage; and it is immaterial that the property has continued to be the homestead after the death of the wife, and the children of the marriage are minors. A purchaser of such surviving husband becomes a tenant in common with the children, who inherit their mother's community interests; and the right of such purchaser to a partition of the property cannot be postponed until the children become of age, or acquire homesteads of their own. But the purchaser may abstain from requiring a partition and proceed for half the rents and profits.<sup>2</sup>

<sup>1</sup> *Petty v. Barrett*, 37 Texas 84.

<sup>2</sup> *Hartman v. Thomas*, 37 Texas 90; *Rich v. Tubbs*, 41 Cal. 35; *Schadt v. Heppe*, 45 Cal. 433; *Bowman v. Norton*, 16 Cal. 214; *Brennan v. Wallace*, 25 Cal. 114; *Brood v. Murray*, 44 Cal. 228; *Johnson v. Bush*, Cal. S. C., Oct. Term,

**§ 339. Rights of children in community property.**—Where there are children of a marriage, and the homestead is community property, the surviving conjugal partner is entitled to retain the homestead; but if there are no community debts, cannot sell more than his or her half of the property; and if, there being no such debt, he or she has attempted to sell the entire estate, and has delivered possession to the purchaser, the children are entitled to recover from the latter the community interest descended to them from their deceased parent.<sup>1</sup>

On the death of a connubial partner the interest of the deceased in the community property passes to his or her heirs. The homestead property, however, remains subject to the homestead rights of the survivor; but when the survivor abandons the homestead the heirs are entitled to partition.<sup>2</sup> It is not the homestead right which descends, upon the death of either parent, to their children, which the survivor cannot control or alienate, but it is the fee of an estate in common with the surviving parent, subject only to the conditions—if a homestead, to occupy it during life. This homestead right is a right guaranteed to every family by the Constitution of 1845 and 1866. It was not a right transmissible or inheritable to or by the heir at common law; but community property was transmissible. When it is community property as well as homestead, though the survivor can sell the homestead right, or abandon it, after the death of the conjugal partner, yet the survivor cannot sell that which was inheritable and did descend on the death of one of the parents to the children, except as already stated. The survivor has the right to sell or dispose of his or her own interest in the property, but not by metes and bounds. He or she is and becomes a tenant in common with his or her children, with unity

1874; *Gee v. Moore*, 14 Cal. 474; *Himmelman v. Schmidt*, 23 Cal. 117; *Brood v. Brood*, 40 Cal. 493.

<sup>1</sup> *Walker v. Young*, 37 Texas, 519, and cases cited in the foregoing note, as well as 37 Texas 572, 502; 15 Id. 140; 20 Id. 782; *Clark v. Nolan*, 38 Texas 416.

<sup>2</sup> *Bell v. Schwarz*, 37 Texas 572, and cases cited from California in the previous paragraph. *Folsom v. Carli*, 5 Minn. 337; *Clark v. Nolan*, 38 Texas 416.

of possession and unity of title, and their interests alike in the estate—where subject to community debts.<sup>1</sup>

#### WIDOW'S RIGHTS.

**§ 340. The homestead to be set aside for the use of widow and children.**—The homestead statute of Texas requires the Probate Court to set aside the homestead for the use of the widow and children at the first term of the Court after the inventory and list of claims have been returned, which may be before the solvency of the estate has been judicially ascertained. Though it may be subject to final partition and distribution, it is not assets in the hands of the administrator, but the use of it as a homestead is reserved to the family during the the period of administration; and it will be set apart for the widow and children, irrespective of the disposition of the fee by will.<sup>2</sup>

**§ 341. Only the lawful wife can make the claim.**—A woman who was not the wife nor is the widow of a man deceased, cannot claim any homestead rights through him. If the deceased leaves a lawful wife and children, the homestead right, if any such attached, would pertain to them.<sup>3</sup>

**§ 342. The homestead which the widow is entitled to have set apart for her use** is not confined to the former residence of the family, nor to town or country. The law gives to the widow the full and free right of selecting and having her homestead set apart for her and her children out of the whole property of her deceased husband. The homestead exemption is for the benefit of the family, and the head of the family is entitled to select his or her homestead as he or she may judge from the circumstances of each case to be for

<sup>1</sup> *Magee v. Rice*, 37 Texas 502. To the same effect, *Jones v. Jones*, 15 Texas 140; *Tadlock v. Eccles*, 20 Texas 782; *Good v. Coombs*, 28 Texas 50; *Brewer v. Wall*, 23 Texas 585; *Burleson v. Burleson*, 28 Texas 418; *Cooper v. Singleton*, 19 Texas 267; *Walker v. Howard*, 34 Texas 478; *Sosseman v. Powell*, 21 Texas 666.

<sup>2</sup> *O'Doherty v. McGloin*, 25 Texas 67.

<sup>3</sup> *Robinson v. Crump*, 35 Texas 426.

their best interests, and where the homestead selected by the widow may not be of the value of the statutory amount, it will be made up in money arising from the sale of other property, should there be any.<sup>1</sup>

**§ 343. Allowance to the widow a superior lien.—**Where the estate of the deceased husband is insolvent, the decree of the Court, making an allowance for the support of the widow, and also for an allowance of an amount of money in lieu of articles exempt from forced sale, but not exceeding in kind that which she was entitled to have set apart for her use, is a judgment lien of a superior nature to all other judgment liens, and takes precedence of them. This claim belongs to the second class of debts to be paid in preference to all others, except such as for funeral expenses, etc. It has precedence over specific liens created in the lifetime of the deceased husband, except when such lien is for the purchase-money of the property to which it is attached.<sup>2</sup>

**§ 344. When the claim for allowance must be made.—**Where an estate is solvent, and is ready for distribution, it is too late for the widow and children to apply for an allowance in lieu of the property exempt from execution, because the time has elapsed during which the statute of the State designs to secure such property to the widow and children, and an allowance of it subsequent to that time would be in contravention of the provision which directs that such property shall be distributed among the heirs.<sup>3</sup>

**§ 345. Deceased must have had his domicile in the State to entitle the widow to homestead.—**This right of the widow to a homestead or allowance results from the domicile of the husband within the State at his decease. Her rights are not dependent on the whereabouts of her residence afterwards.<sup>4</sup> Where the wife leaves the State, with her hus-

<sup>1</sup> Ragland v. Rogers, 34 Texas 617.

<sup>2</sup> Robertson v. Paul, 16 Texas 472; Giddings v. Crosby, 24 Texas 295.

<sup>3</sup> Little v. Birdwell, 27 Texas 690.

<sup>4</sup> Green v. Crow, 17 Texas 180.

band, who has sold the homestead without the wife's signature, and is domiciled in another State, where the husband dies, and after several years the widow returns to her former home, she has lost her right of homestead as the surviving widow, which she might have had had she not changed her domicile ;<sup>1</sup> or where she voluntarily abandons her home, deserting her husband, and becomes domiciled in another State, she cannot, after her husband's death, return from such foreign home, and claim a homestead.<sup>2</sup>

**§ 346. Descent to widow during widowhood—Subsequent removal.**—In Mississippi, under the provisions of the Act of 1852, the title to the homestead or quarter-section of land exempt by law from execution for the husband's debts, vests immediately upon his death in the widow—if there be no children—during widowhood, free from all liability for the debts of the husband ; and her title, so vested, is not forfeited in favor of the husband's creditors by her subsequent removal from the State.<sup>3</sup>

**§ 347. Exempt property not affected by debts contracted before the passage of the act.**—The provision of the foregoing statute which provides that all the property, real and personal, of the deceased, which by law was exempt from execution in his lifetime, shall go and descend to his widow and children, exempt from his debts, saves the property to the widow and children, as well against the claims of creditors before the passage of the act, as also against those created after, in cases where the father and husband dies after the date of the act.<sup>4</sup>

**§ 348. Widow entitled to the right, though husband died before adoption of the constitution giving the right.**—In South Carolina, the widow is entitled to a homestead in the real estate of her deceased husband, and this, al-

<sup>1</sup> *Jordon v. Godman*, 19 Texas 273.

<sup>2</sup> *Travick v. Harris*, 8 Texas 312.

<sup>3</sup> *Brown v. Brown*, 33 Miss. 39, and Statute of 1865 ; *Smith v. Wells*, 46 Miss. 64.

<sup>4</sup> *Morrison v. McDaniel*, 30 Miss. 213.

though he died before the adoption of the Constitution of 1868, giving the right.

And even when the widow joins in a petition with the administrator for the sale of the real estate for payment of debts, a decree pro confesso was entered against the widow of the intestate and a decree for sale made. It was held that the decree was no bar to an application afterwards made by the widow to the Probate Court to have a homestead set off to her in the lands ordered to be sold.<sup>1</sup>

**§ 349. Widow though without children entitled to the right.**—That a widow has no child or children is of itself no ground for holding that she is not entitled to the homestead exemption allowed by the constitution.<sup>2</sup>

**§ 350. Where no debts, no homestead, in North Carolina.**—Where a husband dies leaving no debts, in that State, it is held, under the Constitution of 1868, and Acts of 1868 and '69, Chap. 127, Sec. 10, that the widow cannot have a homestead laid off for herself and minor children. The reason assigned for this rule is, that the act applies only where there are creditors of the deceased owner, and that as between the widow and the heirs, the estate goes under the general laws.<sup>3</sup> Yet the statute provides that "the homestead shall continue during the minority of any of the children." And if the owner dies "leaving no children, but a widow, the exemption shall continue during her life."

**§ 351. The widow and minor children of a deceased person are entitled as against creditors to a homestead,** to be laid off just as it would have been upon the application of the husband and father previous to his death.<sup>4</sup>

It is said that the theory of the homestead provision of the Constitution, and the Act of 1868, is to set apart for the sole

<sup>1</sup> Ex parte Strobel, 2 Rich. N. S. 309

<sup>2</sup> Bradley v. Rodelsperger, 3 Rich. 226.

<sup>3</sup> Hager v. Nixon, 69 N. C. 108.

<sup>4</sup> Hodo v. Johnson, 40 Ga. 439; Adams v. Adams, 46 Ga. 630; Moore v. Gill, 43 Ga. 388; Sims v. Johnson, 40 Ga. 555.

use of the family of the debtor what is deemed a support for the family. The family, and the family alone, is the object and intent of the homestead enactments. When and while that exists the homestead exists, and when that ceases the homestead ceases. And when a homestead is laid off to a debtor and his family, which, at the time, consisted of only a wife; and the husband and wife both die, leaving no family but adult children, the homestead reverts to the estate of the husband, and is subject to debts as other property.<sup>1</sup>

**§ 352. Widow, without children, not entitled to homestead**—A widow, who has no children living with her dependent upon her for support, is not entitled to a homestead out of the property of her deceased husband, as the head of a family.<sup>2</sup>

**§ 353. The "minor children of a deceased father are entitled,** as against the creditors of the father, to the homestead and exemption provided for by Article 5, Sec. 1, of the Constitution of 1868, and such homestead exemption being similar in object with the laws allowing dower to the widow and minor children, is to be construed in harmony therewith, and such minor children will take their homestead, and exempt personalty, subject to dower in the same, and a year's support allowed.<sup>3</sup>

**§ 354. Distributive share of adult heirs.**—But it would seem in contradiction of this rule, in relation to minor children's right, that such right does not obtain as against the distributive share of the adult heirs. The question whether the homestead clause in the Constitution of 1868, and the act passed the same year, giving effect to such clause, so changed the statute of distribution as to give the widow and minor children of a deceased person a homestead and exemption in his property as against the claims of the other heirs at law to their distributive share, came before the Court, and it

<sup>1</sup> Heard v. Downer, 46 Ga. 629.

<sup>2</sup> Calhoun v. McLendon, 42 Ga. 405; Kidd v. Lester, 46 Ga. 231

<sup>3</sup> Roff & Co. v. Johnson, 40 Ga. 555.



was held that neither the widow nor minor heirs of a deceased person have any right of homestead in the property of the deceased as against the claim of the adult heirs to their distributive share, under the statute of distribution.<sup>1</sup>

**§ 355. In Louisiana, the rights granted the widow and children of a deceased person by the Homestead Act of March 17th, 1852, vests in them at the time of the death of the deceased, provided their condition in life at that moment of time entitle them to the benefit of the act—that is, that they have not property of the value of one thousand dollars. Their pecuniary circumstances, at the time of the death of the insolvent, and not at any subsequent time, settles their right to any claim under the homestead act.<sup>2</sup>**

**§ 356. Widow takes full property when no children—When there are children, takes only the usufructury.—**Under this homestead act, the widow, where there are no surviving children or other descendants of the deceased, takes the bounty provided thereby in full property; but where there are children or other descendants she has merely usufructury rights in it.<sup>3</sup>

**§ 357. Must be residents of the State.—**In order to entitle the widow or orphan children to a homestead allowance, they must be, in contemplation of law, at least, residents of the State at the time of the death of the father or husband.

Thus, where the residence of the decedent in his lifetime is in another State, although dying in Louisiana, where he had been daily in business, the widow and orphan children are not entitled to the allowance for homestead purposes of \$1,000. The law of 1852 makes this allowance where the widow and children are in necessitous circumstances, which was admitted in this case. But being residents of Mississippi at the time of the death of the husband and father, their subsequent removal to Louisiana would not confer the right to

<sup>1</sup> Kemp. v. Kemp, 42 Ga. 523.

<sup>2</sup> Gimble v. Gimble, 13 La. An. 352.

<sup>3</sup> Succession of Yarborough, 13 La. An. 378.



the \$1,000 as homestead, which is allowed to widows and orphans in necessitous circumstances domiciled in the State. The situation of the claimants at the death of the husband or father governs any rights the successors or heirs had vested immediately on death.<sup>1</sup>

**§ 358. The domicile of the husband controls that of the wife, therefore—**

Where the husband, domiciled in Louisiana, dies, leaving property in the State, the surviving wife is entitled to the benefit of the homestead law, notwithstanding she has never resided in the State.

This decision arose under the following state of facts: The deceased and his widow were married in 1845, in New York, where they both resided. After the birth of two children, he left for California; subsequently took up his residence in Louisiana, where he died, and where his estate was being administered upon, his wife and children remaining in New York, and never having been in Louisiana.

In the foregoing case of the succession of Norton, such a demand (homestead allowance) was refused, on the ground that the domicile, in contemplation of law of both husband and wife at the time of the death of the husband, was in Mississippi, "and that the homestead law was enacted for the benefit of those domiciled in the State at the time of the death." "In this case, it is admitted that the domicile of the husband was in Louisiana at the time of his death, and as by our law the domicile of the wife is the domicile of the husband, the case of Norton, (printed Cooper, 18 La. An. 36) is not precisely in point." We think that the domicile of the husband must control in this matter, and regulate the rights of the wife and children under this act with the same propriety that half the community property is given to a wife who has never been in the State.<sup>2</sup>

<sup>1</sup> Succession of Norton, 18 La. An. 36; Bell v. Schwartz, 37 Texas 572; Rich v. Tubbs, 41 Cal. 35; Schadt v. Heppe, 45 Cal. 433, and cases cited from Texas, Sec. 330.

<sup>2</sup> See Cole's Widows v. Ex., 7 N. S. L. (7 Martin 401) 42, and Dixon v. Dixon, 4 L. 191.

“The evidence shows that the widow is in possession of property worth \$100, and under the provisions of the Statute, she is entitled to the usufruct of nine hundred dollars out of this succession during her widowhood, when it vests in the children of the deceased.”<sup>1</sup>

**§ 359. Widow and children have a superior lien.**—This allowance under the homestead law of Louisiana to the surviving widow and children of the deceased husband, have a superior mortgage and privilege on the proceeds of the sale of the property of the husband to the extent of one thousand dollars over all other creditors, except the vendor's privilege and the expenses of the sale. The widow may assert the privilege in a suit between the other creditors, whether mortgage creditors or otherwise, and the purchaser of the property before the Court that granted the order of seizure and sale.<sup>2</sup>

**§ 360. Homestead personal privilege, as long as widow remains unmarried.**—In Minnesota, as in Texas, (and in California, up to the passage of the Act of 1860) under the Act of 1851, the homestead right was a purely personal one. The right did not alter in any way the estate or title in the homestead premises. If they had been the separate property of the husband or the wife, before the homestead character attached, they still remained such separate property. The homestead owned and occupied by the head of the family was exempt from sale on execution, and from that only. The exemption from sale was continued after the death of the head of the family so long as the premises were occupied as a homestead by the widow, she continuing unmarried, and until the youngest child attained its majority.<sup>3</sup>

After the decease of the housekeeper, or head of the family, his widow has the right to hold, control, and enjoy the homestead as a home for herself, without restraint or abate-

<sup>1</sup> Succession of Christie, 20 La. An. 383.

<sup>2</sup> Quartier v. Hill, 21 La. An. 429.

<sup>3</sup> Folsom v. Carli, 5 Minn. 339.

ment by any of the children of her deceased husband who are not members of her family.<sup>1</sup> The clear design of the law is to continue the homestead entire as the home of the widow, or of the widow and children constituting the family at the decease of the husband, and no rights of the children become operative to sever or divest such homestead as the family home, so long as the widow, or widow and children, see fit to continue it as such family home.<sup>2</sup>

**§ 361. Widow's right in Pennsylvania.**—The same principle obtains in Pennsylvania as to the quasi homestead—real or personal estate of the value of \$300—exemption allowed by the statute of that State. The widow is allowed the exemption from the estate of her deceased husband, whether he died solvent or insolvent; so much of the estate belongs to her, and her children, if she have any, for the use of the family.<sup>3</sup>

**§ 362. Widow's rights in Iowa, descent and distribution.**—Upon the death of the husband, the widow holds the homestead free from debts, exactly as the husband did, and she becomes the head of the family.<sup>4</sup> So the husband, after the death of his wife, has the right to occupy and possess the whole homestead, and this regardless of the fact as to which, the husband or the wife, is owner of the fee, and also regardless of the fact of issue or no issue.<sup>5</sup> Thus, the widow being entitled to the use and occupancy of the homestead, her second marriage does not entitle the heirs of her first husband to partition.<sup>6</sup> But the homestead descends to the heirs of either husband or wife, whichever may hold the legal title, subject to the right of occupancy in the survivor.<sup>7</sup> An administrator has no right, therefore, to recover of the

<sup>1</sup> *Keyes v. Hill*, 30 Vt. 759.

<sup>2</sup> 3 *Id.*, and *Perrin v. Sargeant*, 33 Vt. 84.

<sup>3</sup> *Compher v. Compher*, 25 Penn. St. 31.

<sup>4</sup> *Floyd v. Mosier*, 1 Iowa 512.

<sup>5</sup> *Burns v. Keas*, 21 Iowa 265; *Stewart v. Brund*, 23 Iowa 477.

<sup>6</sup> *Nicholas v. Purcell*, 21 Iowa 265; *Dodds v. Dodds*, 26 Iowa 311; *Size v. Size*, 24 Iowa 580.

<sup>7</sup> *Cotton v. Wood*, 25 Iowa 43.

widow rent for the use or occupation of the homestead.<sup>1</sup> When the fee is in the husband, on his decease the legal title descends to the heirs, subject to the foregoing right of occupancy; therefore, the widow, not having the fee, cannot after a second marriage abandon, sell, and convey the homestead to another, with a view of investing the proceeds in another homestead. Though the widow cannot sell her homestead in order to procure a new one with the proceeds, on application, a Court of chancery might authorize such a change, care being taken to see that the title to the new homestead shall be held the same as the old, and that all the parties in interest shall be the same.<sup>2</sup>

**§ 363. Widow's rights in Massachusetts.**—The assignment of dower to the widow by the heirs at law does not defeat her right to the homestead estate of \$800, in addition to dower, if so much estate remains to which the homestead right attaches.<sup>3</sup>

The title to the homestead estate is said to be in the widow during widowhood, and in all the minor children, respectively, while under age; but the right of possession and enjoyment is in those only of the family who remain in occupation of the premises.<sup>4</sup>

But if the widow, before the homestead estate is set off to her to which she is entitled, procures an assignment to herself of dower of one-third of the rents, issues, and profits, as tenant in common with the other owners, and then conveys it, she waives and relinquishes her rights of homestead.<sup>5</sup>

**§ 364. An estate of homestead created by statute cannot be affected by the will of the householder.**—A power in the husband to terminate this freehold with his life, by disposing of the land in his will, it is said, by the Massachusetts Courts, is inconsistent with the spirit and intent of the

<sup>1</sup> Huey v. Huey, 26 Iowa 527.

<sup>2</sup> Size v. Size, 24 Iowa 580.

<sup>3</sup> Mercier v. Chace, 11 Allen 194.

<sup>4</sup> Abbott v. Abbott, 97 Mass. 136; Monk v. Capen, 5 Allen 146; Shaw v. Hearsay, 5 Mass. 523.

<sup>5</sup> Bates v. Bates, 97 Mass. 392.

statute, as manifested in the clauses declaring that no release or waiver except by deed, and no deed from the husband alone without his wife, should be valid in law, and that the exemption should continue after his death, for the benefit of his widow and children.<sup>1</sup>

**§ 365. When no proceedings necessary.**—Where the whole premises are of less value than the exemption allowed by statute, the widow has no occasion to institute any proceedings to set out a homestead, if she was in occupation of the premises during the lifetime and at the time of the decease of her husband.<sup>2</sup>

**§ 366. Widow's right in New Hampshire.**—The same principle is fully sustained, and the widow who continues after the decease of her husband to occupy the family dwelling is entitled to have it assigned to her out of the estate, and her right thereto is paramount to the claims of creditors, heirs, and devisees, so long as she continues in such occupancy. And such assignment is to be made notwithstanding the estate may be under the incumbrance of a mortgage which is paramount to the homestead right, and in making the assignment the estate is to be valued as though it were free from mortgage.<sup>3</sup>

Nor will any conveyance by mortgage, or a lease, or other conveyance not signed by the wife, bar the widow of her homestead, nor will the temporary residence of the husband in a foreign jurisdiction, or the purchase of a doubtful or contingent estate there, deprive the wife of her estate created under the act where the right is claimed.<sup>4</sup>

**§ 367. A voluntary separation of husband and wife,** in New Hampshire, will not, after the husband's decease, deprive the widow of her homestead rights under the statute of that State.<sup>5</sup>

<sup>1</sup> *Brettun v. Fox*, 100 Mass. 234.

<sup>3</sup> *Norris v. Moulton*, 34 N. H. 392.

<sup>2</sup> *Parks v. Reilly*, 5 Allen 77.

<sup>4</sup> *Meador v. Place*, 43 N. H. 307.

<sup>5</sup> *Meador v. Place*, 43 N. H. 307.

§ 368. In Pennsylvania, the two latter rules are somewhat modified: where a wife leaves her husband and renounces all conjugal intercourse a considerable time (twelve years) before his death, it is held that she becomes not such a widow after his death as was in the contemplation of the legislature when the act was passed, entitling her to administer his estate, and to appropriate to her own use the exemption allowed the widow by law.<sup>1</sup>

It is further held, that the wife who has lived in a foreign country, and never formed part of her husband's family within the State, is not within the contemplation of the law.<sup>2</sup> Nor is a wife who, by articles of separation, has relinquished all her rights to her husband's estate.<sup>3</sup>

These laws contemplate the case of a wife who lives with her husband till his death and faithfully performs all her duties to his family, not one who voluntarily separates herself from him and performs none of the duties imposed by the relation.<sup>4</sup>

But when the wife has been deserted by the husband, and he has been absent many years, there is no rule of law which requires such married woman to take notice at her peril of his death. Therefore, if when she does hear of his death, she takes means immediately to have her exemption set out to her from her husband's property, it will be allowed her. It is not her fault that the family relation does not actually exist; nevertheless, it exists in contemplation of the law.<sup>5</sup>

§ 369. Absence or removal from homestead no bar to claim.—In New Hampshire, the right of a married woman to a homestead to be assigned to her after her husband's death, is not impaired by her removal from the premises during his life, nor by her continued absence after his death. It is inconsistent with the general scope, policy, and object of the

<sup>1</sup> *Tozier v. Tozier*, 2 American Law Register 510.

<sup>2</sup> *Spiers' Appeal*, 2 Casey (26 Penn.) 233. Per contra, see *Succession of Norton*, 18 La. An. 36; *Succession of Christie*, 20 La. An. 383.

<sup>3</sup> *Cilinger's Appeal*, 11 Casey (35 Penn.) 537; *Hettrich v. Hettrich*, 55 Penn. St. 290.

<sup>4</sup> *Odiorne's Appeal*, 54 Penn. St. 175 (4 P. Smith).

<sup>5</sup> *Terry's Appeal*, 55 Penn. St. 345.

homestead laws, to allow a waiver of the homestead without a written instrument acknowledged in the mode pointed out by law in such cases.<sup>1</sup>

So, where the husband in his lifetime conveys the real estate occupied by himself and wife as a family homestead, the wife not joining in the deed, after his death the widow, although out of possession, is entitled to claim, and have assigned to her therefrom, a homestead of the statutory value, which will vest in in her as a conditional estate for life, its continuance depending upon the condition subsequent, that she continues to occupy it as her homestead.<sup>2</sup>

**§ 370. In what property a homestead may be assigned the widow.**—There is no authority in the Probate Judge to assign to a widow her homestead, except in the estate of which the husband died seized, or perhaps when there is no dispute about the title.<sup>3</sup>

No demand of a homestead is necessary to be made to enable a widow to maintain her petition for the assignment of her homestead interest, and it is not a valid objection to such assignment that the petitioner has not an estate, but merely a right in the premises.<sup>4</sup>

A widow is entitled to a homestead in an equity of redemption in real estate of her late husband against all persons except the mortgagee, or those claiming under him. But she cannot have a homestead as against the mortgagee, except by payment of the whole mortgage debt. Against any and every one having an interest in the redemption, and who has actually redeemed the mortgage, she can hold her homestead upon payment of contribution. If the administrator redeems the mortgage from the assets of the estate, then the widow takes a homestead without contribution. If the equity of redemption is purchased after the death of the mortgagor, by the mortgagee, the two estates become merged, and in such case the widow may hold her home-

Norris v. Moulton, 34 N. H. 392 ; Atkinson v. Atkinson, 37 N. H. 436.

<sup>2</sup> Atkinson v. Atkinson, 37 N. H. 434 ; Davis v. Andrews, 38 Vt. 678.

<sup>3</sup> Horn v. Tufts, 39 N. H. 478.

<sup>4</sup> Atkinson v. Atkinson, 40 N. H. 249.

stead discharged from the mortgage by paying contribution only. The mortgage debt is to be shared between the owner of the equity of redemption and the widow having homestead, according to the relative value of the proportion of mortgaged property held by each.<sup>1</sup>

**§ 371. Widow's right of homestead as against creditor's claims.**—And if a creditor, whose debt accrued before the passage of the homestead acts, presents his claim to the commissioner on an insolvent estate, takes his dividend, and without objection allows the widow's homestead to be assigned by the Probate Court, and the administrator for the payment of the debts sells the land assigned, subject to the widow's homestead, such creditor cannot afterwards require the administrator to sell any interest in the land assigned for homestead, to pay the balance of the debt. In such case, if a creditor would enforce his claim against a widow's right of homestead, he should object to the assignment until his debt is paid.<sup>2</sup>

**§ 372. Exchange of homestead, death of husband before building house.**—But where the husband exchanges the homestead for land, and conveyances are accordingly executed, after which he takes possession of and cuts some logs on the land for the purpose of building a house thereon, but dies before he does so, a Court of equity will not decree a conveyance of the land to the wife by the husband's administrator, in order that she may sell it, and with the proceeds purchase another homestead.<sup>3</sup>

**§ 373. Bar of homestead by anti-nuptial agreement.** A widow may bar her right of homestead, as well as dower, by anti-nuptial agreement. Where a "plaintiff was the second wife of the intestate, who died without issue of their marriage: an anti-nuptial agreement had been entered into between them, whereby she covenanted to claim no share in his estate, otherwise than according to the provisions of said

<sup>1</sup> *Norris v. Morrison*, 45 N. H. 490.

<sup>2</sup> *Judge of Probate v. Simonds*, 46 N. H. 363.

<sup>3</sup> *Palmer v. Blair*, 25 Iowa 230.



agreement. The plaintiff did not elect to waive the provision made for her by said agreement, but, induced by the fraud and artifice of the only son and sole heir of the intestate, accepted and received the same in full of all claim against said estate, and retained the same without offering to restore it to the estate. Held, that the plaintiff was thereby barred of dower and homestead. Held, also, that without waiver of said provision, and notice of it in writing, the Probate Court had no power to decree the plaintiff homestead and dower, although said provision was wholly inadequate for her support. The Probate Court, on the plaintiff's application, caused homestead and dower to be set out to her, from which proceeding this appeal was taken. Held, that although such proceedings might be considered as equivalent to a decision that said provision was not sufficient for her support, and to an extension of time for making election; yet that it could not supply the indispensable requisites of election waiver and notice thereof in writing to the Probate Court." <sup>1</sup>

**§ 374. A widow is not bound by a verbal agreement of her husband during his lifetime, by which his homestead was to be conveyed to third parties in consideration that the latter were to support him and his wife during their lives, although the husband, previous to his death, with the knowledge of his wife, delivered a deed duly executed, but not signed by his wife.** <sup>2</sup>

**§ 375. Claim of widow in land, where she acts as agent for the sale, and is silent as to her own claim.**—Where the widow of the true owner of land acted as agent for another person in negotiating a sale from the latter to a third person without notifying him that she or her husband claimed any interest in the land—although it does not appear that at the time she knew of her rights, or that the party with whom she was dealing relied upon her representations—it was held that she was not estopped from setting up her claim after her husband's death. But if the widow married

<sup>1</sup> *Hathaway v. Hathaway*, 46 Vt., 13 Am. L. Reg., N. S., 778.

<sup>2</sup> *Ring v. Burt*, 17 Mich. 465.

again, she could not recover such land on the ground that it had been her husband's homestead ; but she can recover the rents and profits from the death of her former husband to the time of her second marriage, deducting the value of the permanent improvements made.<sup>1</sup>

**§ 376. When a widow's right to the possession of real estate comes under the law of dower only, and not under the law in relation to homestead, she cannot claim possession of the premises by virtue of her homestead right.<sup>2</sup>**

**§ 377. Widow's right as against an heir** (of real estate liable to sale for payment of the debts of the deceased, and subject to a mortgage for payment of one of them) who gives to the executor under the statute a bond conditioned to pay all the debts, and in fulfilling that condition takes to himself an assignment of the mortgage, cannot, by virtue of the mortgage title and by foreclosure, defeat estates of dower and homestead previously assigned to the widow in the mortgaged premises with his assent.<sup>3</sup>

**§ 378. Widow's right in Pennsylvania.**—There are a great number of decisions under the exemption laws of 1843, 1846, 1849, 1851, and 1859, which relate to probate matters, but as has been remarked elsewhere, the exemption allowed may be either real or personal property, in all not to exceed three hundred dollars in value, which can hardly be classed in the category of homestead exemption. Still, a few of the decisions may be useful in illustrating or supplying rules in cases that may arise.

A section of the Act of 1851 provides as follows : “Hereafter the widow or children of any decedent dying within this commonwealth, testate or intestate, may retain either real or personal property belonging to said estate to the value of three hundred dollars, and the same shall not be sold, but suffered to remain for the use of the widow and family.”

<sup>1</sup> *Anderson v. Coburn*, 27 Wis. 558.

<sup>2</sup> *Cavender v. Smith*, 8 Iowa 360.

<sup>3</sup> *King v. King*, 100 Mass. 224 ; *Draper v. Baker*, 12 Cush. 288.

**§ 379. Widow's right to sell.**—Under this statute, it has been held that a widow to whom real estate had been set apart under the act, can sell it, and her conveyance will pass the title to the vendee, who can maintain ejectment against her.

The words which, *prima facie*, seem to establish a trust in the widow, "and the same shall not be sold, etc.," have no operation on the language of the exemption. "They apply only to the officers of the law whose duty it is to administer the estate."<sup>1</sup>

**§ 380. Personal privilege, waiver by the widow.** The right of a widow to retain real or personal property of her deceased husband's estate, to the value of \$300, is a personal privilege, and of course may be waived, and it is waived entirely when she neglects to demand an appraisement.<sup>2</sup> And of course if an appraisement be made, and the widow elect to retain less than the statutory value, she waives her claim to all she neglects to retain. Having had one appraisement, she is not entitled to another, when the remaining property of her husband is about to be sold for the payment of debts. Therefore, a demand for an appraisement is too late after the administrator has incurred expenses in proceedings to effect a sale of the property.<sup>3</sup>

**§ 381. No further allowance where widow appropriates to her own use \$300 worth of her deceased husband's property,** without any appraisement or administration, and a creditor of the decedent afterwards takes out administration—she cannot recover against him for not setting out to her her exemption under the Acts of 1851 and 1859. Those acts require administration, a claim, and election of realty or personalty, and an appraisement for the widow. If, therefore, a widow disregards the legal mode of proceeding, and neither takes out administration herself nor causes any one

<sup>1</sup> *Sipes v. Mann*, 39 Penn. St. 414.

<sup>2</sup> *Weaver's Appeal*, 6 Harris, (18 Penn.) 309; *Neff's Appeal*, 9 Harris (21 Penn.) 247.

<sup>3</sup> *Davis' Appeal*, 34 Penn. St. 256; *Baskin's Appeal*, 38 Penn. St. 65.

else to do so for her, she cannot recover damages against him for not setting out to her her exemption.<sup>1</sup>

**§ 382. Widow must make claim within reasonable time.**—If she claims her statutory allowance under the “Widow’s Act” she must make her claim within a reasonable time after her husband’s decease; but if she delays her claim seven years, and then prosecutes it through a second husband, she is not entitled to the exemption. And if, through such claim, any property is set apart to her, the proceedings in appraisement will be a nullity and pass no title to her, and she can be ejected at the suit of the owner.<sup>2</sup>

**§ 383. Widow’s right as against certain lien creditors.**—She is entitled to her exemption out of the real or personal estate of her deceased husband, as against all lien creditors whatever, excepting only as against a vendor’s lien for unpaid purchase-money, which is the only lien protected by the Act of 1851.<sup>3</sup>

The Court refused to apply the foregoing interpretation in *Gangware’s Appeal*,<sup>4</sup> but it will be seen by references to the cases that the circumstances were entirely different, and under a statute entirely different from the Act of 1851. Nor does the reasoning in behalf of mechanics’ liens which was employed in *Lauck’s Appeal*,<sup>5</sup> apply under the Act of 1851, for the Exemption Law of 1849, under which both the above cases arose, is based on “judgments obtained on contract.” Only against such judgments were debtors entitled to the exemption, and it was held that neither mortgages nor mechanics’ liens were “judgments obtained on contract.” But the Widow’s Act of 1851 is entirely different. It contemplates every case of a decedent leaving any estate, and a widow and children. It gives them first of all \$300, and postpones all other claimants except only vendors of realty.<sup>6</sup>

<sup>1</sup> *Lyman, Adm., v. Byam et al.*, 38 Penn. St. 475.

<sup>2</sup> *Burk v. Gleason*, 46 Penn. St. (10 Wright) 297.

<sup>3</sup> *Hildebrand’s Appeal*, 39 Penn. St. 133.

<sup>4</sup> *Gangware’s Appeal*, 12 Casey Penn. St. 471.

<sup>5</sup> *Lauck’s Appeal*, 12 Harris 428.

<sup>6</sup> *Baldy’s Appeal*, 40 Penn. St. 329; *Hill v. Hill*, 42 Penn. St. 198; *Hildebrand’s Appeal*, 39 Penn. St. 133.

**§ 384. Charge upon realty, when personalty not sufficient.**—If the personal property of a deceased husband be not of sufficient value to satisfy her claim of exemption, the balance may be charged upon the realty, and as such follows the lands into the hands of a purchaser from the heirs who have received it under a partition, and the Orphan's Court has power to enforce the payment of the same so charged by a decree for the sale of the land.<sup>1</sup>

**§ 385. Actual levy before death bars widow's claim.** But when an execution has been levied during the lifetime of the husband, but before the sale he dies, his widow is not entitled to the exemption out of the proceeds of sale, which is affected by virtue of the levy so made.<sup>2</sup>

**§ 386. Who the lawful widow.**—It has been decided that, when a woman had married a man who had been previously lawfully married, and whose wife was living at the time of his second marriage, and the woman subsequently married a second husband, who died, she was his lawful wife, and was entitled to claim the exemption of three hundred dollars as the widow of the deceased.<sup>3</sup>

#### WIDOW'S RIGHT.

**§ 387. Dower and homestead in the same land.**—A diversity of opinion exists among the authorities, whether the widow is entitled to a homestead and dower in the same lands.

For instance, in Iowa and North Carolina it is maintained that it was not the intention of the law-makers that a widow should enjoy, at the same time, both dower and homestead in the same real estate of her husband.

Where a widow, on her own application, had her dower set off so as to include the dwelling-house of the deceased and a portion of the forty acres comprising the homestead, it

<sup>1</sup> Detweiler's Appeal, 44 Penn. St. 243.

<sup>2</sup> Thompson's Appeal, 36 Penn. St. 418.

<sup>3</sup> In re Shaak's Estate, 3 Pitts, 275.

was held that she could not claim the residue under a homestead right. Section 2295 of the Revision enacts that, "upon the death of either husband or wife, the survivor may continue to possess and occupy the whole homestead until it is otherwise disposed of according to law." On this point, the Court said :<sup>1</sup> "It is otherwise disposed of according to law, if it is, upon her application for dower, ordered to be sold, because not susceptible of division, and it is thus sold, and one-third of the proceeds paid to her, with which she may buy a new homestead." If this is so, why is it not also "otherwise disposed of according to law," if it is set apart to her in fee as dower upon her application? After that she occupies her own homestead, not her husband's, so to speak. The Court, in this case, did not decide whether the widow could be compelled by the heirs to accept dower, when she herself preferred to retain the homestead right.

For anything that was there decided, it may well be that the widow would have the right, as against the creditor's heirs or devisees of the husband, to retain her homestead right, and refuse her dower. It is also possible, but this was doubted by the Court, that if the dower was assigned in lands other than the homestead, the widow might retain her right in the homestead as well as the dower assigned.

In this Iowa case, it would appear that the views therein expressed are not tenable. Dower is a common-law right, and all statutes defining dower are merely directory. By the common law, a wife is dowered of one-third of her husband's lands, and she ought to receive that dower. Whether she ought, in addition, to have a homestead right, is a question for the legislature that passes the homestead acts. The legislature knew, when they passed the homestead act, that she was entitled to dower, but they did not except a dowered widow from the benefits of the homestead act. It would seem that, without an express enactment to the contrary, a

<sup>1</sup> *Meyers v. Meyers*, 23 Iowa 359 ; *Watts v. Leggett*, 66 N. C. 197.

In North Carolina, it is held that dower and homestead do not attach together, either in the widow, or widow and children, but dower having been assigned to the widow, the children are only entitled to a homestead *sub modo*, *i. e.*, a present interest, the enjoyment of which is postponed until the death of the doweress.

widow is dowerable out of the homestead estate ; that is, she is entitled to both rights in the same parcel of land. If she is entitled to the homestead, under the statute, certainly her one-third dower right is comprised in the whole. In other words, if she takes the whole under the homestead law of the particular State, there would seem to be no question of dower in that particular piece of land. "It is a peculiar and favored right ; so much favored, indeed, that, according to Lord Bacon, it is 'the common by-word in the law, that the law favo-  
reth three things : first, life, second, liberty, third, dower.'"<sup>1</sup>

In Vermont, under the Act of 1849, which was silent as to dower and homestead in the same land, the practice was to set out the homestead to the widow, then dower in the balance of all the lands of the deceased husband.<sup>2</sup> The statute of 1855 provided that the widow's share in the homestead shall be deducted from her dower. Under this last act a widow's dower was first set out in one full third of the estate. Her homestead was afterwards set out, covering a portion of the premises embraced in the assignment of dower. It was held that this was a virtual compliance with the requirements of the statute, and that there was no incompatibility in the proceeding.<sup>3</sup>

**§ 388. Rule as to dower and homestead in Kentucky.** The homestead exemption, after the death of the husband, continues for the benefit of his widow and children, "but shall be estimated in allotting dower." Dower of widow is increased in certain cases by the Homestead Exemption Act of 1866.<sup>4</sup> If one-third of the deceased debtor's land is of less value than one thousand dollars, the widow is entitled to have allotted to her as for her dower so much of the land, including the homestead, as was of the value of one thousand dollars, "but shall be estimated in allotting dower."<sup>5</sup>

**§ 389. In Alabama, it is held that dower is no bar to a homestead claim.**—Under Section 2061 of the Revised Code, it is held that the widow and children are entitled as

<sup>1</sup> Cox v. Wilder, 2 Dill. C. C. 46.

<sup>3</sup> Doane v. Doane, 33 Vt. 652.

<sup>2</sup> Doane v. Doane, 33 Vt. 651.

<sup>4</sup> Myer's Supplement, 714.

<sup>5</sup> Gasaway, etc. v. Woods, 9 Bush (Ky.) 72.



against creditors—but not as against heirs, distributees, or legatees,—that is, where the lands of the decedent have to be sold to pay his debts, to have so much of the land as will amount to \$500 in value set apart for their benefit; and this notwithstanding dower may have been assigned to the widow. The Act of December 9th, 1864, provides the manner in which the judge of probate “shall proceed to lay off and set apart said land.” If the judge of probate does not so proceed, it is allowable for the widow to file a petition to enforce the right conferred by the statute, and it is the duty of the Court to proceed, and it cannot repudiate or reject the petition.<sup>1</sup>

**§ 390. Widow with separate estate no bar to homestead right.**—And even the fact that the widow has a separate estate of greater value than her dower and distributive share, will not bar the right of herself and her minor children to their homestead exemption of the value of \$500 in the lands of her husband. And when the widow’s petition for such exemption fails to set out the names of the minor children, and no objection is made on that account, it is not material. If the title was vested in the widow by name, and the minor children as a class without designation by name, it would be upon the maxim that, “That is certain which can be made certain.”<sup>2</sup>

**§ 391. In Illinois, the widow is entitled to the right of dower and homestead in the same land,** and the reasoning of the Court in announcing that conclusion is much more satisfactory and in unison with the general spirit and object of the homestead law. The homestead right and the right of dower are held to be distinct and independent rights, the former being a mere right of occupancy of the premises under certain circumstances; the latter, though an inchoate right, does not depend upon occupancy, but upon the marriage, the seizin of the husband during coverture and upon his death. Until the death of the husband, it is merely an interest which attaches to the land by reason of marriage and seizin; it rests

<sup>1</sup> Jordon v. Strickland, 42 Ala. 315. <sup>2</sup> Johnston v. Davenport, 42 Ala. 317.



in action only, and cannot be conveyed by deed. After it is assigned it becomes an estate upon which the widow can enter, and which she can convey by deed, and which is liable to be sold on execution for her debts. It is a settled maxim of the law that of this right a widow cannot be deprived—except by operation of the statute of limitations in certain cases<sup>1</sup>—except by the mode pointed out by statute.<sup>2</sup>

And a right of dower does not merge in a homestead right in the same premises, because as these interests in the widow are of a different nature, there is no lesser estate capable of being merged in a larger one. Therefore, if a husband dies in possession of the homestead, his widow would be entitled not only to the right of homestead, but to her right of dower as well, in the same premises.

**§ 392. Value of homestead right paid to husband during his life on foreclosure does not debar widow from claiming dower in the whole land.**—And even where the husband had mortgaged the homestead premises, and upon foreclosure, he having claimed the right of homestead therein, they being worth more than \$1,000 the sum was paid to him and the property was sold under the foreclosure, upon his death his widow will not be restricted in her claim to dower in the premises, to the residue of the property after deducting the value of the homestead right which had been paid to her husband on the foreclosure, but she will be entitled to dower in the entire premises unaffected by the purchase of the homestead right.<sup>3</sup>

**§ 393. Remarriage of widow, entitled to dower in homestead as well as in all the land of the deceased husband.**—In Wisconsin, it is held that a widow who has had dower assigned to her in all the lands of her husband, not being homestead, may have dower assigned to her in the homestead also if she marries again.<sup>4</sup>

**§ 394. In Georgia, if the widow have a minor child, she is entitled to a homestead and dower in the same**

<sup>1</sup> Owen v. Peacock, 38 Ill. 33.

<sup>2</sup> Nicoll v. Ogden, 29 Ill. 386.

<sup>3</sup> Walsh v. Reis, 50 Ill. 477.

<sup>4</sup> Bresee v. Stiles, 22 Wis. 120.

lands.<sup>1</sup> But where a married man died intestate, leaving a widow as his sole heir at law, who elected to take her dower in the lands of her deceased husband, she is not afterwards entitled, as against her husband's creditors, to have a homestead out of the other lands of which her husband died seized.<sup>2</sup>

**§ 395. In Massachusetts, the widow is entitled to dower and homestead.**—It is held in that State that there is nothing inconsistent in the right to both dower and homestead in the same estate.<sup>3</sup>

**§ 396. So, in Mississippi, it would appear that the widow is entitled to dower and homestead:** it is held that the Probate Court has no power to authorize an administrator to take into possession and lease out the exempt homestead, or to interfere with the widow's right of dower.<sup>4</sup>

**§ 397. Descent after devise.**—In Minnesota, after the death of the head of the family the homestead descends to the widow and minor children, and may be held by them until the widow dies or marries again, or until the minor children attain full age. The homestead then goes to the heirs or devisees of the deceased owner in fee.<sup>5</sup>

**§ 398. In Massachusetts the title to homestead after death of the husband and father is characterized as such an estate as that of husband and wife at common law under a grant to both of them, by which they become seized of the entirety, where neither could dispose of any part without the assent of the other.**<sup>6</sup>

“But although the title in the homestead estate is in the widow during widowhood, and in all the minor children respectively, while under age, the right of possession and en-

<sup>1</sup> *Adams v. Adams*, 46 Ga. 630.

<sup>2</sup> *Hickson v. Bryan*, 41 Geo. 620.

<sup>3</sup> *Monk v. Capen*, 5 Allen 146.

<sup>4</sup> *Smith v. Wells*, 46 Miss. 64; Act of Nov., 1865.

<sup>5</sup> *Folsom v. Carli*, 5 Minn. 337.

<sup>6</sup> *Shaw v. Hearsey*, 5 Mass. 523.

joyment is in those only of the family who remain in the occupation of the homestead."<sup>1</sup>

**§ 399. In Texas, on the death of one of the spouses intestate, the community interest of the decedent descends alike to all the children, whether by the same or several spouses.<sup>2</sup>**

#### ABANDONMENT BY WIDOW.

**§ 400. In Illinois, after the death of the husband, the widow, in relation to abandonment of the homestead, is placed in the same position that the husband would be if living. The widow, being under no disability, may abandon the homestead. Where it appears that it has ceased to be her home and that she has adopted another domicile, she thereby loses the right to the privilege extended to her by law. So it will be if she abandons it with the intention of not returning, although she may not have acquired another home. But temporary absence, from sickness or other cause, with an intention of returning, would be quite different, and no privileges sanctioned by the statute would be lost.<sup>3</sup> The same principles which apply to the husband, and govern the question of abandonment, apply to the widow, except in those States where the children have rights which cannot be defeated.**

**§ 401. What is deemed abandonment of homestead by widow.—A woman, though entitled to an estate of homestead while her husband is alive, may by her own acts after his death lose her right. By having dower assigned to her in all the lands of the decedent, and then conveying her interest, she is deemed to have abandoned her right to such homestead.<sup>4</sup>**

A married woman who has withdrawn altogether from the State and is domiciled in another State cannot claim any homestead privilege; nor can a woman who has without good cause voluntarily deserted her husband's bed and board for

<sup>1</sup> Abbot v. Abbot, 97 Mass. 136.

<sup>3</sup> Wright v. Dunning, 46 Ill. 276.

<sup>2</sup> Morrill v. Hopkins, 36 Texas 686.

<sup>4</sup> Bates v. Bates, 97 Mass. 392.

several (two or three) years immediately previous to his decease, make a claim to the homestead or widow's allowance at the husband's death. In both these cases the action of the wife has been held to be tantamount to an abandonment of their homestead privileges.<sup>1</sup>

Mr. Justice Libscomb, in delivering the opinion of the Court in the foregoing case of *Travick v. Harris*, said :

“ When the wife has voluntarily withdrawn from the narrow but sacred precincts of that home in which she was protected by law, and left the State, and domiciled in another State ; that she should claim the protection of the homestead law is so very repugnant to the beneficent designs it contemplates. From her domicile in a foreign land she cannot, after the death of the husband she had abandoned, claim the homestead, and thus convert what was intended for the holiest purposes to mere speculation.”

**§ 402. Abandonment by widow does not debar claim of children.**—Where a widow with minor children, whose father died within the State, married a second time, and she and her husband, after living in the county of her first husband's residence for some time, left the State, taking the minors with them, but frequently avowed their intention of returning to their former home, which they claim never to have abandoned, and application is made on behalf of the minors for homestead out of their father's estate, by next friend, in the county in which their father died resident, their homestead will be allowed to them, and if the facts constitute an abandonment by the mother, as far as the children are concerned there will be no abandonment.<sup>2</sup>

<sup>1</sup> *Travick v. Harris*, 8 Texas 312 ; *Earle v. Earle*, 9 Texas 630 ; *Monk v. Capon*, 5 Allen 146 ; *Moore v. Titman*, 43 Ill. 169 ; *Stewart v. Brand*, 23 Iowa 478 ; *Orman v. Orman*, 26 Iowa 361 ; *Fyffe v. Buss*, 18 Iowa 5 ; *Dunton v. Woodbury*, 24 Iowa 74 ; see case of *Lies v. Diablar*, 12 Cal. 330.

<sup>2</sup> *Haskins v. Arnold*, 46 Ga. 656 ; *Blue v. Blue*, 38 Ill. 10 ; *Denton v. Woodbury*, 24 Iowa 74 ; *Moore v. Dunning*, 29 Ill. 130 ; *Cabeen v. Mulligan*, 37 Ill. 230. See for contrary opinion *Buck v. Conlongue*, 49 Ill. 394, and *Wright v. Dunning*, 46 Ill. 271, where it is held that the widow, being as much the head of the family as the father while living, could abandon the homestead and affect the right of minor children. As to abandonment in general, Sec. 278 et seq., Chap. IX.

**§ 403. Alienation of the homestead, after descent, children not affected by act of widow.**—When the homestead has been set apart for the minor children of a deceased person, it is doubtful whether such homestead can afterwards be sold during a minority of the children. If it can be sold at all, it can only be sold by the intervention of a Court of equity, in the same manner as other realty belonging to minors can be sold. Certainly the executor as such could not sell the property. The setting apart of the land as a homestead divested the estate of the decedent of the title, and conferred it upon the minors, and the deed of the executor in such case would be worth nothing.<sup>1</sup>

So where the widow releases all her interest in the homestead to a purchaser, such release will in no wise affect the interests of the children.<sup>2</sup>

**§ 404. Liens on property set aside as homestead in probate**—An order of the Probate Court setting apart property as a homestead, will not defeat a mortgage which has properly vested as a lien on the property, when the mortgagee was not a party to such proceedings.<sup>3</sup> And a mortgage executed by the husband to secure an antecedent debt, would be valid against the widow after his decease and her claim of homestead.<sup>4</sup>

A widow's claim to exemption is not superior to the lien of a judgment recovered against the husband during his lifetime (before the passage of the homestead act).

The right vests in the debtor as soon as he obtains judgment, and the act, not being retroactive, does not disturb vested interests.<sup>5</sup>

A person who advances money to the purchaser to pay the vendor for realty sold, does not stand in the place of the vendor so far as regards a lien for the money advanced. “Mani-

<sup>1</sup> *Sloan v. Vance*, 45 Ga. 310; *Blue v. Blue*, 98 Ill. 10.

<sup>2</sup> *Miller v. Marckle*, 27 Ill. 402; *Vanzant v. Vanzant*, 23 Ill. 541. Of course, these principles apply only in those States where the homestead does not inure exclusively for the benefit of the widow.

<sup>3</sup> *Lies v. Diablar*, 12 Cal. 327.

<sup>4</sup> *Wood v. Lord*, 51 N. H. 448.

<sup>5</sup> *Rishell v. Rishell*, 48 Penn. St. (12 Wright) 243.

festly he is a loan creditor, and nothing more." Therefore a widow is entitled to her exemption as against such loan creditor. The possessor of a "vendor's lien is he who has parted with his lands in consideration of the price agreed to be paid." But a man who lends money to pay the purchase price of land is by no means a vendor, nor can he have a vendor's lien on the land.<sup>1</sup>

Where A made a sale of land to B, taking his notes for the purchase-money, giving his bond for titles, and afterwards indorsed one of the notes to C, who indorsed it to D, and B having paid some of the purchase-money abandoned the land, and A having died, his administrator took possession of the land: held, that the indorser and minor children of A are entitled to a homestead in the land as against a judgment obtained by D on the indorsed note against B as principal, and A and C as indorsers. The equity of B under his bond for titles, with some of the purchase-money paid, to pay the purchase-money and demand title, does not, in such case, make the lien of the judgment paramount to the homestead.<sup>2</sup>

**§ 405. Lien of attachment, death of defendant.**—The death of a defendant, after levy of an attachment upon his property, and before judgment, dissolves the lien of attachment.<sup>3</sup>

#### ACTION AND PRACTICE IN PROBATE.

**§ 406. Sale of the homestead by guardian of insane husband, without signature of wife.**—Where the homestead is selected, and subsequently the husband becomes insane, and a guardian is appointed by order of the Probate Court, who petitions the Court for an order to sell the homestead, which order is granted and the property is sold by virtue of the proceedings: held, that the Court had no authority to sell the homestead without the wife joining in making the deed to the purchaser, although the wife knew of the pen-

<sup>1</sup> *Notte's Appeal*, 45 Penn. St. 361.

<sup>2</sup> *Faircloth v. St. Johns*, 44 Ga. 603.

<sup>3</sup> *Hensley v. Morgan*, 47 Cal. 622; *Myers v. Mott*, 29 Cal. 367.

dency of the proceedings in the Court, and urged the sale and received from the guardian a portion of the proceeds of the sale, and appropriated the same to the support of herself and children. The Court said that "a guardian is but a representative of his ward, and has no greater power in the disposition of the property of his ward than the latter would have if laboring under no disability; and clearly he has no power to dispose of the estate of the wife of his ward.<sup>1</sup> But in Massachusetts, under similar statutes, the contrary doctrine was held. The statutes of 1855, C. 238, exempt the homestead from sale on execution, and prevent the husband from alienating it without the concurrence of the wife. The Court held that the law did not exempt the homestead from sale by the guardian of the owner, for payment of his debts, and for his support and maintenance, upon a license of the Court of Probate.<sup>2</sup>

**§ 407. Sale of homestead by order of Court, who parties, minor heirs.**—Where upon a bill filed by the next friends of minor children to enjoin the sale of certain lands and personalty under a decree before rendered, in which they claimed an interest under a homestead set apart to them, and as heirs of their deceased mother, counsel representing said next friends upon the hearing of the application for an injunction, consented to said sale, the guardian of said minors not being a party to the bill, and said lands were sold to a purchaser, who, the bill alleged, bought with notice of the claims of said children, and was proceeding to take possession of the land then held by the guardian of said minors as their homestead.

Held, upon a bill filed by the guardian of said minors attacking the decree under which the sale was made, praying that said purchaser be enjoined from taking possession of said

<sup>1</sup> Fledge v. Garney, 47 Cal. 371.

<sup>2</sup> Wilbur v. Hickey, 8 Grey 432. It is submitted, that the rule in the California case is the better law; indeed, the reasoning in that case seems unanswerable—that the guardian is but the representative of his ward, and can do only that which the ward could do if no incapacity intervened. Here, in the very teeth of the statutory prohibition, the guardian can do that which would be unlawful for the ward to do, if he were in a disposing mind.



property, equity will restrain such action until the rights of said minors can be fully determined upon a final decree.<sup>1</sup>

An administrator's sale of land, after the homestead law takes effect, is void as against the heirs, when the land is shown to have been the intestate's homestead. Or if the record in the Probate Court does not show affirmatively one of two facts, either that the land was not decedent's homestead, or that there were debts contracted before the passage of the homestead act, for which it was necessary to sell the land, the sale in like manner would be void.<sup>2</sup>

**§ 408. A widow is considered a creditor of her deceased husband's estate** to the extent of her separate allowance, and is entitled to have the real estate sold for its payment, but if the will of the husband decree separate parcels of real estate to her and his children the fund for the payment of her allowance should not be raised exclusively from the property devised to the children, but should be apportioned between that and the property devised to her according to their respective value. But in apportioning the burden between the widow and children, the homestead being in the occupancy of the widow, but devised to the children, should not be taken into account or ordered sold.<sup>3</sup>

**§ 409. Widow, tenant in common.—Petition for partition the proper remedy.**—On application by the widow for an assignment of homestead, where such applicant has not an estate in the land, but merely a right in the premises, petition for partition against the tenant of real estate is a proper proceeding by such widow whereby to obtain an assignment of her homestead therefrom.<sup>4</sup>

In those States where the right is not extinguished by a second marriage, if the widow claims a homestead a bill in equity is a proper proceeding for the recovery and assignment of such homestead, and the minor children are proper if not necessary parties.<sup>5</sup> Again, where the right of homestead is

<sup>1</sup> Colley v. Duncan, 47 Ga. 668.

<sup>3</sup> Deltzer v. Scheuster, 37 Ill. 301.

<sup>2</sup> Howe v. McGivern, 25 Wis. 525.

<sup>4</sup> Atkinson v. Atkinson, 37 N. H. 434.

<sup>5</sup> Miles v. Miles, 46 N. H. 261.



conferred only where there are minor children, the petition should allege a dependent family, or it will be bad on demurrer, as it should affirmatively show that applicant was entitled to the homestead under the act.<sup>1</sup> But it would seem that such objection must be made in the lower Court, as objection to such petition in failing to allege the names and ages of minor children, being first made in the appellate Court, was disregarded.<sup>2</sup>

**§ 410. Creditors may make objections to the regularity of the proceedings, and contest the right of the applicants to be considered "the family of minors" of the deceased.**<sup>3</sup>

**§ 411. When the claim for allowance to widow should be made.**—When the estate is solvent and is ready for distribution it is too late for the widow and children to apply for an allowance in lieu of the property exempt from execution, because the time has elapsed during which the law designs to secure such property to the widow and children.<sup>4</sup>

**§ 412. Jurisdiction of Probate Courts as to the homestead.**—In the administration of an estate the Probate Court has jurisdiction to ascertain what is the homestead; but in Texas, the Court has no jurisdiction to order the sale of the homestead, nor would a purchaser at such sale take any right as against the minor children.<sup>5</sup> Such is the law in relation to the sale of the homestead or other property in most of the States, except perhaps in a few of those States where such jurisdiction is especially given by law.

**§ 413. Who entitled to money awarded in lieu of homestead.**—Where there was no homestead pertaining to an insolvent estate, the Probate Court ordered the administrator to pay to the widow of decedent \$2,000 in lieu of a homestead. The guardian of the decedent's child sued the

<sup>1</sup> *Lynch v. Pace*, 40 Ga. 173.

<sup>2</sup> *Johnson v. Davenport*, 42 Ala. 317.

<sup>3</sup> *Roft, Sims & Co. v. Johnson*, 40 Ga. 555.

<sup>4</sup> *Little v. Birdwell*, 27 Texas 690.

<sup>5</sup> *Cannon v. Bonner*, 38 Texas 487.

administrator for half the allowance. Held, that the exceptions to plaintiff's petition were properly sustained.<sup>1</sup> The allowance being made to the widow she alone could maintain an action for it.

<sup>1</sup> Burt v. Box, 36 Texas 114.

## CHAPTER XII.

## ACTION AND PRACTICE.

**§ 414. Parties are bound by the determination of the Court.**—In actions and in practice in relation to the homestead right, the well known rule of law that parties to a suit in a Court of competent jurisdiction, where they labor under no disability, are bound by the determination of their rights, if fairly before the tribunal, applies as well to actions affecting this right as to all others. And where the rights of parties have been once adjudicated, they cannot again be litigated in the same or any other Court of co-ordinate jurisdiction.

Thus, in Illinois, where a widow was made a party in a proceeding for partition by heirs, and it being alleged that she was entitled to dower, the Court awarded to her her dower, she obtaining an allowance in lieu thereof, and the lands were sold under the partition proceeding, subject to the payment of the widow's allowance, she making no claim of homestead at the time : it was held that she could not afterwards set up her homestead right against the purchaser under the partition sale.<sup>1</sup> So, if unmarried persons, the heads of families, capable of releasing the homestead, and occupying it, fail to assert the right when a Court adjudicates upon it in a suit to which they are parties, they will be concluded from afterwards asserting it.<sup>2</sup>

And where a person under a disability is sued, and the

<sup>1</sup> *Tadlock v. Eccles*, 20 Texas 782; *Wright v. Dunning*, 46 Ill. 273; *Chilson v. Reeves*, 29 Texas 276; *Lee v. Kingsbury*, 13 Id. 68; *Baxter v. Dear*, 24 Id. 17; *McCreery v. Fortson*, 35 Id. 641.

<sup>2</sup> *Wright v. Dunning*, 46 Ill. 275.

homestead is involved, it will be affected by any neglect to assert it like any other right.

But where a husband and wife are made parties to a suit, and they are entitled to homestead rights which are not relied upon, the wife is not concluded from afterwards asserting the right; and inasmuch as in those States where she cannot sue alone for the right, it may be asserted by husband and wife notwithstanding the judgment. This exception grows out of the statute conferring the right, which declares that the husband alone cannot release the right, but that he must be joined by his wife. For he would be alone in releasing the right if judgment in a suit where the homestead was concerned was given against him, and he did not plead the right.<sup>1</sup>

In Texas, it is said: "There being nothing in the nature of the homestead right to exclude it from the operation of the general principle, that the judgment or decree of a Court of competent jurisdiction, directly upon the point necessarily involved in the decision of the question, is conclusive between the parties and their privies, upon the same matter coming directly in question in the same or another Court of concurrent jurisdiction, it is essential on the one hand, that all parties whose claims are sought to be barred be brought before the Court, and on the other, that the claims be properly presented so that the benefits intended to be conferred shall be protected." Thus, where a mortgagor, being sued for a foreclosure, pleaded his homestead exemption, and there was a foreclosure nevertheless, ordering the property to be sold, and the property accordingly was sold, it was held that the mortgagor was concluded by the judgment of foreclosure from again pleading his homestead exemption in a suit brought by the purchaser to recover the property.<sup>2</sup>

Nor will the fact that a wife relied upon the promises of a husband by whom she was deceived, to have a defense made for her in the first suit to protect her homestead rights,

<sup>1</sup>Wright v. Dunning, 46 Ill. 274.

<sup>2</sup>Lee v. Kingsbury, 13 Texas 68; Tadlock v. Ecoles, 20 Texas 782; Chilson v. Reeves, 29 Texas 276; McCreery v. Fortson, 35 Texas 641.

entitle her to relief against a judgment of foreclosure after it has once been rendered.<sup>1</sup>

The parties to a foreclosure proceeding are bound by the decree therein, and cannot interpose in an action to recover possession by the purchaser at the sale made under the execution, the defense that the mortgaged premises were their homestead, and that the mortgage for that reason was invalid. Such defense can be made available only in the foreclosure proceedings.<sup>2</sup> But an action may be maintained in equity to set aside the sale of a homestead under execution against the owner thereof.<sup>3</sup>

In Georgia, a creditor is not obliged to go before the "ordinary" and contest the right of a debtor to a homestead on any other grounds than those stated in the sixth section of the Act of 1868, as amended by the Act of 1870. But if he voluntarily appear and submit issues to the "ordinary" which, but for such submission, that officer would have no power to pass upon an application for homestead, and for which the ordinary takes jurisdiction, such creditor will be bound by the jurisdiction.<sup>4</sup> Thus, it is held, that where creditors or others appear before an "ordinary" to contest the granting of a homestead to a wife or widow or family, they are concluded by the judgment upon all questions which it is necessary for the applicant to prove, and upon all questions which the statute provides that the creditors may make, but they are not concluded upon questions over which the ordinary has no jurisdiction, unless it appears that they actually raised such questions, and that they were then decided by the consent of parties.<sup>5</sup>

**§ 415. Legal proceedings, to be conclusive against either husband or wife, must embrace both.**—So it was held where the homestead was claimed by the husband in an action in which he alone was defendant, to foreclose a mort-

<sup>1</sup> *Baxter v. Dear*, 24 Texas 17.

<sup>2</sup> *Haynes v. Meek*, 14 Iowa 320; *McCreery v. Fortson*, 35 Texas 641.

<sup>3</sup> *Coon v. Jones*, 10 Iowa 132; *Barton v. Drake*, Sup. Ct. Minn. 1875, Cent. L. J., vol. 2, 308.

<sup>4</sup> *Patterson v. Wallace*, 47 Ga. 452.

<sup>5</sup> *Harris v. Colquit*, 44 Ga. 663.

gage made by him alone since marriage, that neither the rights of the husband or wife could be affected by the proceedings in that case, the wife not being a party.<sup>1</sup> But the Court will order the wife to be brought in as a party, in an action to foreclose a mortgage against a husband, where the defendant sets up the right of homestead as a defense ; else no decision upon the question of homestead can be conclusive either upon the husband or wife.<sup>2</sup> If the wife is not made a party in a suit to foreclose a mortgage on the homestead, she may intervene, or be allowed by the Court to file a separate answer ; the plaintiff having liberty to amend his complaint if any matters are set up in the answer which he might wish to anticipate by further allegations.<sup>3</sup>

Or where an execution issues on a judgment entered against the husband, and levy or garnishment of moneys in third parties' hands, which are the result or proceeds of insurance of the homestead destroyed by fire, the wife may intervene, and will be heard on motion to set aside such levy or garnishment.<sup>4</sup>

In Kansas, a decree of foreclosure of a mortgage signed by the husband alone, if such decree be entered, even after sale or abandonment of the homestead, wherein the wife was not a party, the decree is void so far as it affects her interests, and is no evidence of anything as against her.

And the same rule obtains in respect to mortgages executed by the wife alone, and this notwithstanding the legal title to the homestead may be in the wife and not in her husband. And where an action is brought to foreclose such mortgage executed by the wife alone, where the homestead is her separate property, the husband is a proper party, and if the action is brought against the wife alone, there is a defect of parties.<sup>5</sup> While it is not essential in all cases to make the wife a party to a proceeding to foreclose a mortgage on the homestead, it

<sup>1</sup> *Revalk v. Kraemer*, 8 Cal. 66 ; *Shoemaker v. Gardner*, 19 Mich. 96.

<sup>2</sup> *Marks v. Marsh*, 9 Cal. 96.

<sup>3</sup> *Sargent v. Wilson*, 5 Cal. 504 ; *Moss v. Warner*, 10 Cal. 296.

<sup>4</sup> *Houghton v. Lee*, Sup. Ct. Cal., July Term, 1875. See Sec. 102.

<sup>5</sup> *Dollman v. Harris*, 5 Kansas 597 ; *Morris v. Ward*, 5 Kansas 239 ; *Revalk v. Kraemer*, 8 Cal. 66 ; *Thorn v. Darlington*, 6 Bush (Ky.) 448.

is in all cases the safer practice, and it is necessary when it is sought to bind her by decree.<sup>1</sup>

But where such foreclosure is of a mortgage given to secure the purchase-money, she need not be made a party.<sup>2</sup>

It is questioned, in Nevada, whether the husband alone can set up in his answer to a complaint for foreclosure, the fact that the property mortgaged is homestead, and that his wife had not joined in the mortgage.<sup>3</sup>

**§ 416. Wife may set up usury.**—In an action to foreclose a mortgage upon the homestead executed by the husband and wife to secure a note executed by the husband alone, the wife may set up a plea of usury against the note. She is interested in protecting the homestead right from any illegal or usurious incumbrance, or in reducing the amount of any recovery under which the same might be sold.<sup>4</sup> And she has such an interest in the homestead as to enable her to maintain an action against a Sheriff to compel him to exhaust her husband's personal property and his other real estate before proceeding to sell the homestead.<sup>5</sup>

**§ 417. The death of the wife after suit brought by her husband and herself for the homestead** may defeat a recovery by the husband, (where he individually would be estopped from claiming the right) although the right to recover existed at the commencement of the suit.<sup>6</sup>

**§ 418. Plea that the deed or mortgage does not operate as a release of the homestead right** can be interposed as a defense in any action by which it is sought to deprive the husband and wife of the right, or to eject them from the premises to which the right attaches. The plea that the deed or mortgage does not operate as a release of the right of homestead may be interposed as a bar in an action of ejectment

<sup>1</sup> Chase v. Abbott, 20 Iowa 154, and cases cited; Clark v. Shannon, 1 Nev. 568.

<sup>2</sup> Amphlett v. Hibbard, Sup. Ct. Mich., April, Term, 1874; Skinner v. Beatty, 16 Cal. 157.

<sup>3</sup> Clark v. Shannon, 1 Nev. 568.

<sup>4</sup> Lyon v. Welsh, 20 Iowa 578.

<sup>5</sup> Bartholomew v. Hook, 23 Cal. 279.

<sup>6</sup> Gee v. Moore, 14 Cal. 472.

against the grantors or mortgagors. Nor will the fact that the premises were of value exceeding the statutory amount at all weaken the defense as a bar to recovery in ejectment.<sup>1</sup>

It is further held, in Illinois, that if a mortgage contains a power of sale, the homestead right in the premises not being released, a Court of equity will interpose by injunction to restrain the mortgagee from selling the premises under a power of sale in the mortgage. And where such mortgage is foreclosed, the omission on the part of the husband and wife to assert their homestead right as a defense to the bill of foreclosure, will not operate as a waiver of their right. But, even after the sale, the husband and wife may have the sale set aside, on motion, on the ground that they held a homestead right in the premises. The defendants can have all the relief by their motion that they could have by original bill in equity.<sup>2</sup>

The homestead right can only be lost by release or abandonment in the mode pointed out by statute. So, in a suit to foreclose a mortgage, in the execution of which the homestead right was not released, a mere failure on the part of the mortgagor to claim the right, by answer or cross bill, will not have the effect to bar the right, or to be considered as a relinquishment of the benefits of the statute. To give a decree by default, such an effect would be to enable the husband to frustrate the design of the statute. It would enable him, by indirection, to release the homestead independent of the action of the wife, when he could not do so in any direct mode.

If the property is worth no more than the statutory limit, the homestead right may be set up as a defense to the suit for foreclosure to defeat a decree, or a bill may be filed to defeat a decree of foreclosure in such case. But if the premises are worth more than the statutory limit, while the mortgagor may claim the benefit of the act, yet the

<sup>1</sup> *Patterson v. Kreig*, 29 Ill. 514; *Smith v. Miller*, 31 Ill. 157; *Connor v. Nichols*, 31 Ill. 148; *Thornton v. Boyden*, 31 Ill. 200.

<sup>2</sup> *Boyd v. Cudderback*, 31 Ill. 113; *Hoskins v. Litchfield*, 31 Ill. 137; *Houghton v. Lee*, Sup. Ct. Cal., July T., 1875. See Sec. 102.



Court will not open a decree in such a case, rendered upon the default of the defendant. But when the master proceeds to execute the decree, he must ascertain whether the homestead right exists, and if so, he must proceed in the manner pointed out by the statute.<sup>1</sup>

**§ 419.** The Court will take judicial notice, that a quarter-section of land consists of four tracts, of forty acres each, with well defined bounds. This being so, it is competent to inquire the value of the forty-acre tract occupied by the debtor, and if it does not exceed the statutory value, the same is exempt unless released in the mode prescribed by the statute. To refuse such inquiry is error.<sup>2</sup>

**§ 420.** In Illinois, where a husband and wife executed a mortgage on premises occupied by them as a homestead, but there was no release of the homestead right: afterwards, the husband abandoned his wife, leaving her in possession of the homestead, but providing no means for her support. A sale of the premises was had under a power in the mortgage, and the purchaser thereat subsequently brought ejectment against the husband, and recovered a judgment, and thereupon ousted the wife from her possession by force. It was held that the judgment in ejectment, so far as the right of homestead was concerned, was a nullity, and though a writ of possession, issued upon such judgment, would be sufficient legally to effect the purpose of expelling the wife from the premises, yet it would not impair or destroy the homestead right. Nor would the right of the wife, in such a case, to assert her claim to the homestead be at all impaired by her omission to plead in the ejectment suit, as she was not a party thereto. In such case, the judgment in ejectment would be a bar to any remedy at law on the behalf of the wife to recover the possession under the claim of the homestead right, but she has a remedy, in chancery, against the party who ousted her, under the judgment, to restore her to the proper enjoyment of her homestead right.

And where the wife files her bill against the plaintiff in an

<sup>1</sup> Moore v. Titman, 33 Ill. 358.

<sup>2</sup> Hill v. Bacon, 43 Ill. 477.

ejectment suit, who thus ousted her from the possession of the homestead, the proper mode of adjusting the right of the parties was determined to be, to take an account of the rents and profits received by the defendant, deducting therefrom the taxes paid by him, and all necessary repairs put upon the premises, and if the premises were worth more than the statutory amount, to make an order in analogy with the statute, to set off the homestead in kind; and if that could not be done, that the premises be sold, unless the defendant would pay to the complainant the value of the statutory homestead and the balance due for rents and profits, and the same would be a lien upon the premises.<sup>1</sup>

In Pennsylvania, it is held, that where a plaintiff enters up judgment on a bond accompanying his mortgage, instead of proceeding on the mortgage itself, and sells the mortgage premises under a *venditioni exponans*, the adoption of one or other remedy does not vary the relative rights of either party. It is said, if the proceedings had been under the mortgage, the mortgagor could not have claimed the \$300 exemption, neither is he entitled to such exemption, because the mortgagee has elected to proceed on the bond.<sup>2</sup>

**§ 421. Accounting of first to second mortgagee for rents and profits when in possession.**—The holder of a second mortgage of real estate, in Massachusetts, which is subject to the mortgagor's right of homestead in part of the premises may, in a bill to redeem, compel the holder of the first mortgage, which is not subject to the right of homestead after he has taken and maintained actual and exclusive possession for the purpose of foreclosure for breach of condition, to account to him for all the rents and profits which, by due diligence, he might have recovered, including the homestead.<sup>3</sup>

**§ 422. Appointment of a receiver in case of foreclosure of mortgage on homestead.**—Very grave doubts were entertained by the Supreme Court of Iowa, whether in any case a receiver should be appointed to take possession and

<sup>1</sup> *Mix v. King*, 55 Ill. 434.

<sup>2</sup> *Dornan v. McAuley*, 3 Phila. 324.

<sup>3</sup> *Richardson v. Wallis*, 5 Allen 78.

charge of a mortgagor's homestead, pending proceedings to foreclose a mortgage. Said the Court: "The question is an interesting and important one, not free from difficulty."<sup>1</sup>

**§ 423. Probate Courts are not proper tribunals to determine litigated questions, or to afford relief.** Courts having equity jurisdiction have full power and authority to hear and determine the questions involved, and to afford such relief, if any, as the parties may be entitled to. So, where B petitioned the Probate Court to make an order for the sale of the homestead to pay the debts of the deceased, secured by a valid mortgage on the homestead, it was held that the order of the Probate Court refusing to direct a sale of the homestead for the purpose of satisfying the mortgage, was not erroneous.<sup>2</sup>

**§ 424. Sale of the statutory overplus.**—In Texas, it is questioned whether a judgment creditor can apply to the Court to exercise its equitable power to subject the surplus over the statutory quantity of the homestead of the debtor, to forced sale or partition for the satisfaction of his judgment. If such a proceeding can be maintained, it must be when the creditor cannot obtain satisfaction of his judgment in the ordinary way, and it must be in subordination of the right of the homestead tenant to point out what property he is willing to give, and that which he intends to retain as his homestead. And a petition in such a suit, if it will lie, must allege that an opportunity had been afforded to the homestead tenant to designate out of the property that part which he selected as his homestead, and that part which should be regarded as excess, and that he had refused to do so. Further, such a petition must aver that the defendant had no other property liable to be taken in execution in satisfaction of the debt.<sup>3</sup>

Where suit was brought to subject the homestead of the defendant to the payment of a judgment to the extent of its value above the exemption allowed by law, it was necessary that the jury in their verdict should find the fact that a judg-

<sup>1</sup> Callanan v. Shaw, 19 Iowa 185.

<sup>2</sup> Estate of Orr, 29 Cal. 101.

<sup>3</sup> Mackay v. Wallace, 26 Texas 526.

ment had been previously rendered against the defendants, otherwise a decree by the Court, condemning the property to sale, is not sustained by the verdict, and was consequently declared erroneous.

**§ 425. Wife's separate funds forming part to be deducted.**—In such cases, where the debt for which judgment was rendered was contracted since the adoption of the State constitution, the correct rule was for the decree to condemn the homestead property, if situated in a city or town, to be sold for the payment of the judgment, in whole or in part, reserving to the homestead tenant from the proceeds of the sale the sum of \$2,000, exempt by the constitution in force at this time. And where the wife of the defendant had expended any of her separate funds upon the homestead property, in improvements or otherwise, the amount so expended was also to be deducted from the proceeds of the sale and paid to her, the creditor receiving any balance there might be after deducting \$2,000, and the amount which the debtor's wife had expended out of her separate property.<sup>1</sup>

**§ 426. Power of sale in trust deed, duty of trustee.**—If a suit, by husband and wife against a trustee and cestui que trust, to restrain the sale of property under the deed of trust, be decided against them, the trust property should not be sold by the sheriff if it be the homestead of the plaintiff; but the trustee should sell in accordance with the powers in the deed.<sup>2</sup>

**§ 427. Practice in selling homestead where over statutory value.**—In California, where an execution for the enforcement of a judgment is levied upon the homestead, the judgment-debtor may apply to the county judge of the county in which the homestead is situate for the appointment of persons to appraise the value thereof.<sup>3</sup> The application must be made on a verified petition showing :

<sup>1</sup> *Paschal v. Cushman*, 26 Texas 74.

<sup>2</sup> *Bomback v. Sykes*, 24 Texas 217.

<sup>3</sup> Cal. Code Civil Procedure, Sec. 1245, in force 1873.

1st. The fact that an execution has been levied on the homestead.

2d. The name of the claimant.

3d. That the value of the homestead exceeds the amount of the homestead exemption.<sup>1</sup>

Upon the filing service of notice upon claimant, and at the hearing, the county judge shall appoint three disinterested residents of the county to appraise the value of the homestead and report the same to the Court.

If from such report it appears to the judge that the land claimed can be divided without material injury, he must, by an order, direct the appraisers to set off to the claimant so much of the land, including the residence, as will amount in value to the homestead exemption, (\$5,000) and the execution may be enforced against the remainder of the land (Sec. 1253).

If it cannot be divided, the judge shall make an order directing its sale under execution, but no bid shall be received unless it exceeds the amount of the homestead exemption. If the sale is made the proceeds thereof to the amount of \$5,000 must be paid to the claimant, and the balance on the execution.<sup>2</sup> The money paid to the claimant is entitled to all the protection against legal process and the voluntary disposition of the husband which the law gives to the homestead.<sup>3</sup>

**§ 428. In Illinois, when money is paid in lieu of homestead.**—When the property is sold under execution, and exceeds the statutory limit, and it cannot be sold in subdivisions, the money so paid is exempt from execution for one year, and is so exempt for one year after it is actually paid to the debtor, and the statute does not begin to run until the money has been handed over.

And if the officer making the execution sale tenders the amount exempted to the judgment debtor, he has a right to decline to take it, until he can test the validity of the sale by which his homestead was sold, by motion in Court, and the time consumed in such litigation is not to be computed as

<sup>1</sup> Cal. Code Civ. Pro., Sec. 1246.

<sup>2</sup> Id., Secs. 1255, 1256.

<sup>3</sup> Id., Sec. 1257.

part of the year during which the money so paid shall continue exempt.<sup>1</sup>

**§ 429. In New Hampshire,** if the homestead exceeds the statutory value, the officer, upon due application, must set out the homestead before he can make sale of any interest therein, and then can only proceed against the surplus. If, after such application, the officer, without setting out the homestead, undertakes to dispose of it, a Court of equity will interfere by injunction, upon the ground that it will create a cloud on the debtor's title.<sup>2</sup>

**§ 430. In Iowa,** "the owner may select his homestead and cause it to be marked out, platted, and recorded; but a failure to do this does not leave it liable, that duty, in case of such failure by husband and wife, devolving on the officer having an execution against the owner."

Where a party claims a homestead in lands used for agricultural purposes, he must allege and show that the homestead claimed does not exceed the quantity allowed by statute; that it is not included in the recorded plat of a city, town, or village.<sup>3</sup> When the defendant pleads his homestead right he may also plead that the homestead is susceptible of division, so that the part consisting of the dwelling-house, etc., may be set off in such manner that the homestead will not exceed the statutory value.<sup>4</sup>

**§ 431. In Minnesota,** where a homestead claimant has a greater quantity of land than the statute allows for a homestead, execution may be had on the excess; the homestead claimant shall point out to the officer who makes the levy what portion of the property he regards as his homestead, and that part shall be free from execution. If the plaintiff in execution shall be dissatisfied with the part so set aside, he may have the premises surveyed, beginning at a point to be designated by the owner, and have set off in a compact form

<sup>1</sup> *Walsh v. Horine*, 36 Ill. 238. In Cal. for six months, under Code, 1874.

<sup>2</sup> *Tucker v. Kenniston*, 47 N. H. 267.

<sup>3</sup> *Rhodes v. McCormick*, 4 Iowa 371.

<sup>4</sup> *Helfenstein v. Cave*, 6 Iowa 374.

the amount of land allowed by statute, including the dwelling-house.<sup>1</sup>

**§ 432. How and when the right of homestead may be asserted.**—Where, after a foreclosure sale, an action of forcible detainer is brought against the husband to oust him from the possession of the homestead, the husband and wife, claimants of the homestead, can assert their right by bill in equity, and thereby enjoin the further prosecution of the action of forcible detainer, and have the forced sale set aside. The wife is not bound to set up her right in an action of forcible detainer. If the right was in the husband, there would be force in the objection that it was not asserted in that suit; but the right is in the wife, and she has no other means of asserting it than by bill.<sup>2</sup>

Where a husband and his wife join in the execution of a mortgage upon premises in which they have a homestead right, but which was not released in the mortgage, the mere omission on their part to interpose their claim to that right as a defense to a bill to foreclose the mortgage will not operate as a waiver of such right. But the mortgagors by original bill in equity can assert their right to the homestead, and while the decree of foreclosure will not be disturbed, the sale and all subsequent proceedings will be set aside, and the master directed to sell the premises in the mode pointed out by the homestead act.<sup>3</sup>

In Georgia, if an application by the head of the family to have the homestead set apart is made before the sale, though after the levy, and proper notice is given thereof to the officer conducting the sale, the land is sold subject to the homestead.<sup>4</sup>

Where the head of a family applied to the ordinary by petition to have a homestead set apart for his family, and accompanied by a schedule of his property, and the land was sold at a sheriff's sale, pending his application, the pur-

<sup>1</sup> Gen. Stat. Minn., Chap. 68, Secs. 3, 4 and 5.

<sup>2</sup> *Booker v. Anderson*, 35 Ill. 66.

<sup>3</sup> *Moore v. Dixon*, 35 Ill. 208; *Wing v. Cropper*, 35 Ill. 256.

<sup>4</sup> *Blivens v. Johnson*, 40 Ga. 297.



chaser at such sale, with notice of *lis pendens*, took the property subject to the incumbrance, where the homestead was properly laid off. And when the head of the family has acted with good faith and reasonable diligence to have his homestead laid off, a Court of equity will interfere to prevent an eviction until all the parties can be fairly heard.<sup>1</sup>

The head of the family may file a claim for the benefit of the family, when property set apart under the homestead and exemption laws of the State is levied upon for the payment of any debt to which it is not subject.

Trespass is a proper remedy in such a case, but it is not the only one. The family are not obliged to wait until they are turned out by the sheriff under an illegal sale, and then sue for the damages; they may arrest the illegal proceedings by a claim under the general laws of the State of Georgia on that subject.<sup>2</sup>

**§ 433. The filing of the declaration of homestead, under the statute of California,** requiring the husband or wife to acknowledge and record the same as conveyances of real estate are required to be acknowledged and recorded, where done by the wife alone, need not be acknowledged in the manner required by law in the case of the conveyance of the separate property of a married woman.<sup>3</sup>

**§ 434. A notice given to a sheriff** who is about to levy on certain premises, that such premises are the homestead of the person giving the notice, does not invalidate the sale. Such notice has neither power to create a homestead right in the premises, nor is it any evidence that such premises were in fact the homestead of the person giving the notice, and the sheriff can proceed with the sale regardless of the notice.<sup>4</sup>

**§ 435. In Ohio, the mode and time prescribed by the statute for the assertion of a debtor's claim to the exemption**

<sup>1</sup> *Kelgore v. Beck*, 40 Ga. 293; *Blivens v. Johnson*, Id. 297.

<sup>2</sup> *Bartlett v. Russell*, 41 Ga. 196.

<sup>3</sup> *Clements v. Stanton*, 47 Cal. 61.

<sup>4</sup> *Vella v. Pico*, 41 Cal. 469. The statute of California requires record notice of claim to be filed.



of a homestead, are, on application of the debtor or his wife, his agent or attorney, to the sheriff or other officer executing the writ of execution, founded on any judgment or decree.<sup>1</sup> When once the homestead has been regularly set off under the statute, no "further proceedings" can be had against it while the right to the homestead so set off continues. The question as to whether a homestead set off under the statute has subsequently become subject to further proceedings against it, should be first presented to and determined by the Court under whose process such proceedings are sought before the same are had.<sup>2</sup>

**§ 436. A bill to protect the homestead must show all the facts necessary to a description of the homestead as defined by law, and must aver that the value does not exceed the statutory limit.** It is not enough to declare simply that the right exists—the pleadings should set out the facts which, if proven, would establish the right.<sup>3</sup> It is said, in Illinois, that when the debtor has shown that he is within the enacting clause of the first section of the homestead act of that State, he is, *prima facie*, entitled to its benefits, and it must be rebutted by the creditor before he can subject the property to levy and sale.<sup>4</sup>

**§ 437. What allegations are sufficient in bill in equity.** In Massachusetts, where the question arose whether a husband is entitled to maintain a bill to redeem land from a mortgage by reason of holding a homestead estate in the equity of redemption, under Stat. 1855, C. 238, the plaintiff's bill alleged that the premises were part of the homestead farm of plaintiff, though separated by the property of other persons from that part of his farm whereon his dwelling-house stood, and that he had acquired an estate of homestead in the premises: the Court held, that demurrer would not lie, on the ground that the bill contained the distinct aver-

<sup>1</sup> *Sears v. Hanks*, 14 Ohio St. 298.

<sup>2</sup> *Wetz v. Beard*, 12 Ohio St. 431.

<sup>3</sup> *Shoemaker v. Gardner*, 19 Mich. 96; *Myers v. Pfeiffer*, 50 Ill. 485; *Harper v. Forbes*, 15 Cal. 202.

<sup>4</sup> *Stevenson v. Marony*, 29 Ill. 532.

ment that the parcel of land described in the mortgage was the homestead of the plaintiff.<sup>1</sup>

**§ 438. Sale of equity of redemption—Homestead right must be claimed before sale.**—Under Statutes of 1859, C. 298, of the same State, a sale on execution of an equity of redemption in land will bar all homestead right therein, unless such rights are claimed at the time of the sale, or before.

Prior to the enactment of the general statutes, a levy of an execution made upon land which is subject to the homestead right, acquired under Stat. of 1855, C. 238, was effectual to pass a title to the reversionary interest of the homestead owner, and nothing more ; and that though, at the time of the execution the estate of homestead had not been set out, and no claim was made thereto, nor was any deduction had by reason of the right.<sup>2</sup> A homestead right is such a freehold estate as will avail a tenant in defense to a writ of entry.<sup>3</sup> If it extend over the entire premises sued for, and require the whole value of the estate to satisfy it, then the action will be defeated.<sup>4</sup> But if it fall short of this, either in value or extent, and there is no disclaimer as to the residue, the demandant is entitled to recover, but his judgment must necessarily be a limited one, in accordance with Gen. Stat., C. 134, Sec. 10.<sup>5</sup>

**§ 439. Proceedings to set out homestead—Mathematical accuracy not necessary.**—In Alabama, in a proceeding under Sec. 2881, Rev. Code, to appraise and set apart to the debtors the homestead exempt from execution, the law does not require that mathematical accuracy shall be observed. And where freeholders are appointed, their action should never be disturbed, except in case of fraud or corruption, or irregularities seriously affecting the rights of one or of both parties.<sup>6</sup>

<sup>1</sup> *Davis v. Wetherell*, 13 Allen 60; *Adams v. Jenkins*, 16 Gray 146.

<sup>2</sup> *Castle v. Palmer*, 6 Allen 401.

<sup>3</sup> *Silloway v. Brown*, 12 Allen 30.

<sup>4</sup> *Parks v. Reilly*, 5 Allen 77.

<sup>5</sup> *Swan v. Stephens*, 99 Mass. 10.

<sup>6</sup> *Pomroy v. Bunting*, 42 Ala. 250.

**§ 440. Tenant in common may apply for partition.—** In Arkansas, when lands held in common are levied upon, a tenant in common is at liberty to apply for partition, and after partition, by fixing his dwelling thereon, will be entitled to the benefit of the homestead exemption.<sup>1</sup>

**§ 441. Estoppel by covenants in deed of homestead.—** The grantor of premises occupied as his home is estopped by the covenants of his deed from maintaining a bill in equity for the assignment of a homestead to himself therefrom. During the lifetime of the husband and father, who has conveyed with covenants the premises occupied as the family home, neither his wife nor minor children, claiming and identified with him, are entitled to have a homestead assigned and set out therefrom against the covenants of his deed.<sup>2</sup>

**§ 442. Cloud on title to homestead, bill in equity.—** The forced sale of a homestead being illegal, and the sale of a house on leased land owned and occupied as a homestead under an execution, confers no title on the purchaser, nor does it divest the homestead claimant of any of his rights. Still, it is a cloud upon the title, and equity will take jurisdiction to remove it, especially when the purchaser under the execution is in possession, and threatens to remove the house, or to commit any other kind of waste. And the Court, if it has acquired jurisdiction, even for other purposes, will proceed to do complete justice, and in such case give rents against the purchaser under the execution for the time the property was occupied by him.<sup>3</sup> In California, a homestead is not affected by levy and sale under judicial process for extrinsic debts or charges; and a purchaser of the homestead premises under an illegal sheriff's sale, can acquire no right to the property. Such a sale being totally void, the sheriff's deed conveys nothing. Thus, where a plaintiff in ejectment claimed to deraign title to the premises in controversy through a judgment rendered against the defendant in November, 1857, an exe-

<sup>1</sup> Greenwood v. Maddox, 27 Ark. 649.

<sup>2</sup> Foss v. Strachn, 42 N. H. 40; Strachn v. Foss, 42 N. H. 43.

<sup>3</sup> Conklin v. Foster, 57 Ill. 104; Harrington v. Utterback, 57 Mo. 519.

cution and sheriff's sale thereunder in 1860, and a sheriff's deed made in pursuance of such sale in September, 1864, it being shown that, at the dates of the judgment, levy, and sale, the premises were occupied by the defendant with his family as a homestead, (under the Act of 1851) it was held that the levy and sale were void, and passed no title to the purchaser.<sup>1</sup> Such a sheriff's deed, being a cloud on the title, and preventing the free alienation of the property, will be removed on application by bill in equity.<sup>2</sup>

**§ 443. Subsequent acquired title, ejectment.**—A sheriff's deed transfers to the purchaser all the interest the execution debtor had in the land sold at the date of the levy, but no subsequently acquired right or interest of such debtor. Nor does the execution sale and sheriff's deed estop the execution creditor from asserting a subsequently acquired right of possession as against the right of possession sold under the sheriff's deed. Thus, where the possessory claim of a settler on public land was sold on execution, and afterwards he entered the same land as a homestead under the Act of Congress of 1862, it was held that he had by his homestead entry acquired from the paramount proprietor a right and interest in the land which he did not possess at the time of the levy and sale, and that this newly acquired right and interest vested an independent right of possession, which would constitute a complete and valid defense to an action of ejectment under the sheriff's deed.<sup>3</sup> It is no valid objection to the maintenance of a suit in ejectment by a married man to recover possession of his homestead, that he has applied for a discharge from his debts under the insolvent laws.<sup>4</sup>

**§ 444. All other property must be exhausted before selling the homestead.**—It is the policy of the law to re-

<sup>1</sup> Deffeliz v. Pico, 46 Cal. 289; Dunn v. Tozer, 10 Cal. 167; Kendall v. Clark, 10 Cal. 17; Williams v. Young, 17 Cal. 403.

<sup>2</sup> Dunn v. Tozer, 10 Cal. 167; Griffiths v. Cunningham, Sup. Ct. Cal., January Term, 1874, (No. 3,965) Pacific Law Rep., March 10th, 1874, not reported; Barton v. Drake, Sup. Ct. Minn., 1875, noticed in Central Law J., St. Louis, May 7th, 1875, Vol. 2, No. 19, p. 308.

<sup>3</sup> Emerson vs. Sansome, 41 Cal. 552.

<sup>4</sup> Moore v. Morrow, 28 Cal. 551.

quire all other property of the defendant in execution to be exhausted before touching his homestead. In the case of the foreclosure of a mortgage covering several pieces of land, one of which is homestead property, the Court will order all the other land to be first sold, and only allow resort to the homestead to supply the deficiency, if any, after all other lands are exhausted. Nor will it allow the land to be sold as a whole; when it is sold as a whole, the sale, on proper application, will be set aside, and a resale ordered.<sup>1</sup> But the defense must be made in the proceeding in foreclosure or enforcement of the lien, otherwise the right will be barred, as the judgment cannot be attacked collaterally.<sup>2</sup>

Thus, in California, where the husband and wife executed a mortgage upon a tract of land, a part of which tract was claimed as a homestead: the husband afterwards executed a mortgage upon a part not covered by the homestead, and the first mortgagee forecloses making the other mortgagee a party, it was held that the second mortgagee could not insist that the homestead be sold, but that the decree should direct that the part not covered by the homestead should be first sold, and if the proceeds satisfy the first mortgage, that the homestead be reserved from sale. That the second mortgagee must rely on the surplus, if any, arising from the sale of the part not covered by the homestead.<sup>3</sup>

So, in Wisconsin, under the Amendatory Act of 1870, and the decisions of that State, it is the practice and rule, that if any portion of mortgaged premises consists of a homestead, to sell that portion, if it is practicable, which is not covered by the homestead claim, and that the homestead should not be sold until all the other lands covered by the mortgage are sold. But a mere irregularity in practice, which does not affect substantial rights, will be no ground for setting aside the foreclosure sale. The party seeking to have such sale declared

<sup>1</sup> *Boyd v. Ellis*, 11 Iowa 98; *Stevens v. Myers*, 11 Iowa 185; *Bradford v. Limpus*, 13 Iowa 424; *Lay v. Gibbons*, 14 Iowa 377; *Burmeister v. Dewey*, 27 Iowa 468; *Denegre v. Hann*, 14 Iowa 240; *Lloyd v. Frank*, 30 Wis. 306; *McLaughlin v. Hart*, 46 Cal. 638; *Bartholomew v. Hook*, 23 Cal. 279.

<sup>2</sup> *McCreery v. Fortson*, 35 Texas 641. See case of *Barton v. Drake*, Sup. Ct. Minn., 1875, reported in Cent. L. Journal, No. 19, vol. 2, 308, May 7th, 1875.

<sup>3</sup> *McLaughlin v. Hart*, 46 Cal. 638; *Dye v. Mann*, 10 Mich. 291.

invalid must prove more than mere irregularity ; he must show that he was substantially injured.<sup>1</sup>

Allegations in bill where it is sought to enjoin the sale under a deed of trust or mortgage, the bill should allege that the owners have such other property, or an injunction restraining such sale will be denied.<sup>2</sup>

But a sheriff's sale under special execution of two hundred and forty acres of land in a body will not be declared void when it appears that the land was first offered in forty-acre tracts by the sheriff, and that no bids were received for any portion thus offered. Nor would the case be changed by the fact that one of the tracts thus sold was the homestead of the defendant. The offering of the property in separate tracts and his endeavors so to sell it, before selling it en block, was held to be an exhausting of the other property named in the writ, within the meaning of the law, which provides that a homestead shall not be sold except to supply a deficiency remaining after exhausting the other property.<sup>3</sup>

This requirement of the statute of Iowa has been held to be directory merely, and that a failure on the part of the officer to comply with it does not affect the title of a purchaser of the homestead at judicial sale.<sup>4</sup>

The interests of a defendant in the assets of a partnership of which he is a member, being liable to be taken in execution or reached by proceedings thereunder, must be first exhausted before resort can be had to the homestead of the defendant.<sup>5</sup> Real estate which has been taken on execution will not be protected by merely claiming it as a homestead, nor is the officer bound to treat it as such when it has not been nor is actually occupied.<sup>6</sup> But where the land is sold a portion of which is occupied for homestead purposes, and it is sold en block, the sale will be set aside on application. But where the lots have been sold separately, a decree setting aside a sale only of the lot on which the debtor's residence

<sup>1</sup> Lloyd v. Frank, 30 Wis. 306.

<sup>2</sup> Stevens v. Myers, 11 Iowa 185.

<sup>3</sup> Burmeister v. Dewey, 27 Iowa 468.

<sup>4</sup> Denegre v. Hann, 14 Iowa 240.

<sup>5</sup> Lambert v. Powers, 36 Iowa 18.

<sup>6</sup> Campbell v. Ayers, 18 Iowa 255 ; Franklin v. Coffee, 18 Texas 453.

stood is proper, and gives to the debtor all the relief to which he is equitably entitled.<sup>1</sup>

The Courts of Illinois, as well as in a large proportion of the other States, have uniformly held that where it appears that land or lots which could be divided and sold in parcels were sold en masse, such sales are irregular, and will be set aside.<sup>2</sup> The case of *Greenup v. Stoker*<sup>3</sup> is no exception to the rule. The facts show that in that case there was but a single quarter-section of land sold, and no allegations or proof that it could have been advantageously divided, or any subdivision would have satisfied the execution if sold. Where a farm is composed of several adjoining tracts, it is the "duty of the officer to offer each tract separately, and if the smallest subdivision will not sell, then add another subdivision to it, and so on till it has been offered in subdivisions, when, not selling, it would be just to the creditor to sell it on a reasonable bid en masse," the officer should make a full return of the facts. In such case, the creditor would have to pay the amount of the homestead exemption (under the statute of Illinois) to the debtor upon making such sale.<sup>4</sup>

**§ 445. Illegal sales of homestead.**—In Georgia, where property exempt from execution has been illegally levied upon, mandamus, among others, is a proper remedy to compel the sheriff to restore the property to the possession of the claimant.<sup>5</sup>

In New Hampshire, at the time of the levy of an execution on land, if the debtor and his family occupy the premises as their home, such execution is properly made subject to the homestead exemption, though neither the debtor nor his wife make application to the officer levying the execution, to set off the homestead in the statute mode. The homestead, being

<sup>1</sup> *Wiggins v. Chance*, 54 Ill. 175; *Linton v. Quinly*, 57 Ill. 273; *Hill v. Bacon*, 43 Ill. 478.

<sup>2</sup> *Day v. Graham*, 6 Ill. (1 Gilman) 435; *Ross v. Mead*, 10 Ill. (5 Gilman) 171; *Stewart v. Croes*, 10 Ill. (5 Gilman) 442, and cases above cited.

<sup>3</sup> 12 Ill. 24.

<sup>4</sup> *Phelps v. Conover*, 25 Ill. 313.

<sup>5</sup> *Mitchell v. Hay*, 37 Ga. 581; *Tucker v. Kenniston*, 47 N. H. 267. }



given by statute to the debtor in his own right, is not lost by the neglect to make such application.<sup>1</sup>

Nor can a creditor lawfully seize and sell, on execution, his debtor's right of redeeming the family homestead, or any interest therein, where it does not exceed the statutory value.<sup>2</sup>

**§ 446. Sale of homestead premises—If occupied, sale void.**—In Illinois, in relation to executions, judgments, and sales, where premises are occupied as a homestead, not exceeding the statutory value, they are not subject to levy and sale, under execution, against the owner; and should premises thus circumstanced be sold under such process, and—there being no redemption—a sheriff's deed made to the purchaser, no title will pass thereby, and the sale will be void, and the judgment and execution will be no lien on the homestead as long as the debtor is in a position to claim the benefits of the law.<sup>3</sup> And when the homestead is thus sold, and the creditor is in a position to claim the benefit of the act, he may have the levy and sale set aside.<sup>4</sup>

Even an abandonment of the homestead by the owner, after the execution of the sheriff's deed, would not operate to render the void sale a valid one, and the purchaser could claim nothing by reason of such abandonment.<sup>5</sup> But a party who claims a homestead exemption, as against a sheriff's sale, must show that the right existed when the judgment was rendered and when the lien attached. It is not enough for him to prove that it was his homestead at the time of the levy and sale.<sup>6</sup>

A sale of property, by a judicial officer, will not be set aside except for such irregularities as manifestly produce injustice

<sup>1</sup> *Fletcher v. The State Capitol Bank*, 37 N. H. 369.

<sup>2</sup> *Tucker v. Kenniston*, 47 N. H. 267.

<sup>3</sup> *Deffeliz v. Pico*, 46 Cal. 289; *Dunn v. Tozer*, 10 Cal. 167; *Green v. Marks*, 25 Ill. 221; *Kendell v. Clark*, 10 Cal. 17; *Williams v. Young*, 17 Cal. 403; *Barton v. Drake*, Sup. Ct. Minn., 1875, Cent. L. Jour., Vol. 2, 308, May 7th, 1875.

<sup>4</sup> *Stevenson v. Morony*, 29 Ill. 534; *Hill v. Bacon*, 43 Ill. 478; *Dunn v. Tozer*, 10 Cal. 167; *Wiggins v. Chance*, 54 Ill. 175; *Linton v. Quimby*, 57 Ill. 273.

<sup>5</sup> *Wiggins v. Chance*, 54 Ill. 175.

<sup>6</sup> *Reinback v. Walter*, 27 Ill. 393.



and wrong. A party will not be permitted to remain until long after the sale, and then, if it be to his interest, avoid it, and if not, permit the purchaser to hold the property.

If, however, the sale of the property, in gross, produces such inadequacy in price as to amount to great wrong and oppression, a Court of equity might entertain jurisdiction even two or three years after the sale, and afford relief against the purchaser, if he had not parted with the title, upon reasonable cause being shown for the delay.<sup>1</sup>

**§ 447. Where the debtor points out property to be levied on, only reasonable accuracy required.**—Where the sheriff comes with an execution to make the amount by levy on real property, and the debtor points out to him the portion thereof he claims to have exempt, only reasonable accuracy is required from the debtor. Thus, where a levy was made on a tract of land, and the debtor claimed forty acres off the west side of the south half as exempt, and it turned out that his dwelling-house was mostly situated on the north half of that tract, it was held that he intended by his selection to embrace the dwelling-house and forty acres corresponding as nearly as possible to the government subdivision which he had pointed out.

The debtor is required to state with reasonable certainty what he claims as his homestead, that is, a sufficient claim to the sheriff; and if the execution creditor is dissatisfied with the amount claimed, the sheriff must cause a survey to be made, setting off the exempt property in a compact form, on the part including the dwelling-house and its appurtenances.<sup>2</sup>

**§ 448. False claim of homestead to part of land does not vitiate levy on part assigned to creditor.**—An officer in levying an execution on a small parcel of land with a dwelling on it, which the debtor claims as his homestead, and which claim is allowed by the sheriff, and he sets off to such debtor an undivided portion as a homestead, and the other undivided part to the creditor in satisfaction of his claim, and afterwards it is ascertained that the debtor had no estate of

<sup>1</sup> *Fergus v. Woodworth*, 44 Ill. 374.

<sup>2</sup> *Herrick v. Graves*, 16 Wis. 157.

homestead in the land, it was held, in Massachusetts, notwithstanding the false claim, that the levy on the part assigned to the creditor was valid.<sup>1</sup>

A sheriff's sale is not invalid because not made expressly subject to the estate of homestead. But as the sale would necessarily be subject to the right of homestead whether so declared or not, the omission to make it so expressly does not operate to invalidate the sale altogether.<sup>2</sup>

**§ 449. Several judgments, and effect of, when homestead abandoned.**—Where two judgments are recovered against the owner of a homestead at different times, and an execution issues on the junior judgment, and while that execution is in existence, and the debtor still in the occupancy of the premises as a homestead, he and his wife release to the plaintiff in the junior judgment their homestead right, and such release is followed by a levy and sale under the execution; subsequently, and after the debtor has abandoned the premises, an execution issued on the senior judgment, and levied upon the premises, and they were sold: it was held that upon the execution of the release of the homestead right, the premises then for the first time became liable to levy and sale, and the execution issued upon the junior judgment being in existence, and a release followed by a levy and sale thereunder, all the debtor's title passed to the purchaser at that sale, and could not be defeated by any subsequent sale under the senior judgment.<sup>3</sup> This result would necessarily follow from the fact that a judgment and execution do not create a lien upon the homestead of a judgment debtor as regards the homestead value, and the owners may sell or mortgage it free from the lien of the judgment.<sup>4</sup>

But in case of the sale of the homestead under execution, where the premises exceed the statutory quantity or value, and there has been no release of the homestead right, the pur-

<sup>1</sup> Bemis v. Driscoll, 101 Mass. 418.

<sup>2</sup> Swan v. Stephens, 99 Mass. 9.

<sup>3</sup> Bliss v. Clark, 39 Ill. 590. See the reasoning in the case in Bonnell v. Smith, 53 Ill. 377.

<sup>4</sup> Green v. Marks, 25 Ill. 221.

chaser will have an equitable lien upon the surplus, which he may enforce as soon as the premises cease to be homestead. And upon the sale of the premises by such purchaser, the lien will pass to his grantee.<sup>1</sup>

Such release of the homestead claim by reason of abandonment, acquisition of new homestead, change of domicile, etc., may be shown by verbal testimony as tending to prove an intention to change such domicile. Such intention is a matter of fact, to be found by a jury.<sup>2</sup>

**§ 450. Pleadings to enforce contract to convey.**—In a suit against husband and wife to enforce their contract to alienate the homestead, it is necessary that the petition should show that the wife executed the contract in the mode prescribed by statute. The privy examination, acknowledgment, and declaration before the officer, as required by the statute, are the essence and foundation of the obligation of her deed, and facts so fundamental and so indispensable to her liability on the contract cannot be supplied by presumption or inference, but must be averred.<sup>3</sup>

**§ 451. Specific performance will not be decreed on contract of husband alone.**—In a suit against the husband alone to enforce such a contract, specific performance cannot be decreed against the husband on account of the rights of the wife, though he may be liable for damages of breach of contract, provided the contract to sell or some memorandum of it is in writing, otherwise it would be void, and no action would lie, therefore it is essential to aver an agreement in writing.<sup>4</sup>

So, in a suit by an administrator to recover possession of premises deeded to his intestate by deed of gift, he set forth the deed in which it was recited, "the property hereby conveyed shall be used as a homestead, and not otherwise." Held,

<sup>1</sup> Blue v. Blue, 38 Ill. 10.

<sup>2</sup> Hoitt v. Webb, 36 N. H. 158; Locke v. Rowell, 427.

<sup>3</sup> Cross v. Evarts, 28 Texas 524; Pascal's Digest, Art. 1003, N. 427.

<sup>4</sup> Ray v. Young, 13 Texas 552; Barton v. Drake, S. C. Minn., 1875, Cent. L. Journal, May 7th, 1875, Vol. 2, No. 19, p. 308; Cross v. Evarts, 28 Texas 524.

that it was necessary that its occupancy as a homestead should have been averred in the petition.<sup>1</sup>

**§ 452. In defenses to actions brought to enforce vendor's liens,** in order to sustain such defense it is necessary to allege that the premises were homestead when the debt sought to be enforced was created. Thus, in Iowa, in an action to enforce a vendor's lien, the defendant set up as a defense that the property against which the plaintiff was endeavoring to enforce the lien was their homestead, but the answer did not clearly allege that it was a homestead when the debt sought to be enforced was created. It was held that a demurrer to the answer was properly sustained.<sup>2</sup>

This rule will apply as well to the purchase of land adjoining the existing homestead to be used as part of such homestead, where the purchase-money is procured to be paid by a third person as a loan to the purchaser. But it is otherwise when the money is borrowed to pay a pre-existing debt.<sup>3</sup>

**§ 453. Contract of sale must be produced in enforcing vendor's lien.**—In an action to enforce the payment of a note or other obligation given to the vendor as evidence of his claim of lien, written evidence of the contract of sale of the land must be produced, or where it is not produced the cause of its non-production must be accounted for. The lien, in such cases, is an incident growing out of the sale and depending upon it. If there had been no sale there could be no lien accruing, and if there had been a sale it must be proven, and any other but written evidence of such sale would be inadmissible under the statute of frauds. But if the bond be not produced in evidence, or its contents admitted, in the event of the defendant failing on notice to produce it, or had it been lost or destroyed, then, but not till then, is it competent for the plaintiff to prove by parol that a note, or other obligation upon which the action was founded, was given for the purchase-money.<sup>4</sup>

<sup>1</sup> Johnson v. McDonald, 37 Texas 595.

<sup>2</sup> Pratt v. Delevan, 17 Iowa 307. The homestead right is subservient to the vendor's lien, Sec. 215, and cases cited.

<sup>3</sup> Austin v. Underwood, 37 Ill. 438. Secs. 218, 221, 223, and cases cited.

<sup>4</sup> Farmer v. Simpson, 6 Texas 307.

**§ 454. No debtor is entitled to exemption as against a vendor for realty sold,** not even though an appraisement has been made and confirmed by a Court, because such action is not an adjudication of the debtor's rights.<sup>1</sup>

Thus, in Georgia, where an execution had been levied on land which had been set apart as a homestead, the plaintiff having made affidavit that the debt on which the execution issued was for purchase-money, and the defendant filed a counter-affidavit to the effect that to the best of his knowledge and belief he paid the purchase-money for the land levied on : held, that a demurrer to said counter-affidavit was properly sustained.<sup>2</sup>

So, in Texas, in the case of *McCreery v. Fortson*, noticed in the chapter on Liens, where, after the death of the purchaser, the land not being entirely paid for, the Probate Court set aside a portion of the land as a homestead for the family ; afterwards, under a decree of the District Court, the entire tract of land was sold for the payment of the purchase-money, notwithstanding the action of the Probate Court.<sup>3</sup>

It is not sufficient to make a judgment a lien upon a homestead (otherwise than as a mechanic's lien) to show that it was for materials furnished and labor performed on the homestead property. It is essential to show that the liability arose before it was occupied as a homestead.<sup>4</sup>

**§ 455. Liability of sheriff.**—Where premises are levied upon and sold by the sheriff which are occupied by the debtor and his family as a homestead, the sale being totally void, and as no damage can result from such sale, no action for damages will lie against the sheriff.<sup>5</sup>

But where an execution has been placed in the hands of the sheriff for levy and sale, it will not excuse him for failing to sell, to show that a third person, not the defendant, has taken a homestead on the land against which the execution was

<sup>1</sup> *Ulrich's Appeal*, 48 Penn. St. (12 Wright) 489.

<sup>2</sup> *McGhee v. Way*, 46 Ga. 282.

<sup>3</sup> *McCreery v. Fortson*, 35 Texas 641.

<sup>4</sup> *Delevan v. Pratt*, 19 Iowa 429.

<sup>5</sup> *Kendall v. Clark*, 10 Cal. 17.

issued. And where he sets up such fact as his only excuse in answer to a rule to show cause why he should not be compelled to pay the amount of the execution to the plaintiff, a rule absolute will be granted against him for the value of the land, if such value be less than the execution, otherwise for the amount of the execution.<sup>1</sup>

A sheriff who was notified in writing that an execution placed in his hands was founded on a debt which was for the purchase-money of land claimed as a homestead, and having failed to enforce the execution, he was held to be liable to the execution creditor for the value of the land he was notified to levy on and sell—the value of the land, and not the amount due on the execution, being the true measure of the damage which the plaintiff sustained by the failure of the sheriff to perform his legal duty.<sup>2</sup>

In Georgia, if at the time of the sale of the land by the sheriff an application be pending for a homestead in favor of the family of the defendant, and notice thereof is given at the sale, the purchaser buys subject to the homestead.<sup>3</sup>

**§ 456. Right of the wife to maintain an action to protect the homestead.**—In many of the States it is held that the wife cannot maintain an action in her own name for the protection of the homestead. Yet the avowed object of the exemption is for the benefit of the wife and children. The husband cannot alienate the homestead, or in any way deprive the wife of the right of enjoyment, without her consent. Yet if by any means the husband succeeds in disposing of the homestead, and delivers the possession to a third person and refuses to sanction proceedings for its restoration, the wife is powerless to assert the right. No satisfactory reason exists why the wife should not in all cases be allowed to assert and protect her right in the homestead. The simple right is of little avail if she cannot assert that right. If she has to wait till the disability is removed by the death of her husband,

<sup>1</sup> *Blackman v. Clement*, 45 Ga. 292.

<sup>2</sup> *Baker v. Bower*, 44 Ga. 14.

<sup>3</sup> *Faircloth v. St. Johns*, 44 Ga. 603; *Blivins v. Johnson*, 40 Ga. 298; *Kilgore v. Beck*, 40 Ga. 296.

before she can assert the right, the claim may be of little benefit to her.

In Texas, it is held that a suit for the recovery of the homestead property cannot be maintained by a married woman in her own name, her husband being no party to the suit, even if the husband has sold it in disregard of his wife's wishes and against her consent, and refuses to institute suit to recover it.<sup>1</sup>

The same rule obtains in California. The reason of the rule is said to be because "the homestead is a joint estate of husband and wife, with a right of survivorship, that it is neither common property which would enable the husband to sue alone, nor is it the separate estate of the wife, which would enable her to sue alone. Both husband and wife must therefore join. The right cannot be individually asserted by either."<sup>2</sup>

But where the husband has appeared she will be permitted to file a separate answer.<sup>3</sup>

The laws of both Tennessee and Wisconsin provide that a conveyance of the homestead property by the husband, without the wife joining in the conveyance, is void; yet in Wisconsin the Court held that where the husband had assigned certain school land certificates, one of which covered the homestead occupied by the family, and after such assignment abandoned his wife and family, the wife could not maintain an action to set aside such assignment of the certificates covering the homestead, on the ground that, being a married woman, she had no capacity to sue, and dismissed her bill, but intimated that she could perhaps maintain possession of the homestead against the assignee or holder of the certificate.<sup>4</sup>

While, in Tennessee, the Supreme Court, in the case of

<sup>1</sup> *Murphy v. Coffee*, 33 Texas 508; *Green v. Lyndes*, 12 Wis. 404.

<sup>2</sup> *Pool v. Gerrard*, 6 Cal. 71; *Marks v. Marsh*, 9 Cal. 96; *Revalk v. Kraemer*, 8 Cal. 66.

<sup>3</sup> *Sargent v. Wilson*, 5 Cal. 504; *Moss v. Warner*, 10 Cal. 296; *Bartholomew v. Hook*, 23 Cal. 279; *Lyon v. Welsh*, 20 Iowa 578; *Houghton v. Lee*, Sup. Ct. Cal., July Term, 1875.

<sup>4</sup> *Green v. Lyndes*, 12 Wis. 404. Per contra, see *Bartholomew v. Hook*, 23 Cal. 277; *Houghton v. Lee*, Sup. Ct. Cal., July, 1875.



Paralee Williams, by next friend, *v.* J. B. Williams et al.,<sup>1</sup> decided that a conveyance of the homestead property by the husband, without the wife joining, was absolutely void ; and that such conveyance nevertheless so far endangers the rights of the wife, that she may maintain a bill in equity to remove the cloud from the title and have her homestead rights declared. After stating that the laws and constitution secure a homestead in the possession of each head of family, and exempt the same from sale under legal process during the life of such head of family, the Court proceeds to say : “ The plain intention of this provision is not merely to protect the husband, or the head of the family, in the possession and enjoyment of the homestead, but the protection of the interests of the wife and the minor children constituted a leading consideration for the adoption of the provision. The fact is apparent by the prohibition against the alienation of the property without the joint consent of husband and wife, when that relation exists. To give complete protection to the wife and children, the homestead is not only exempt from reach of creditors of the husband, but he is deprived of the power to defeat the enjoyment of the homestead by his wife and children, by selling and conveying it, except by deed in which she joins. And the legislature, in giving legislative effect to those provisions,” (of the constitution) “ requires that the conveyance shall be regulated by the laws as to the conveyance of land by married women ; that is, the conveyance can be effective only upon privy examination of the wife.” (Code, Sec. 2114.)

“ It is manifest, from these constitutional and legislative provisions, that while possession of the homestead is the essential feature in the exemption from sale under legal process, or by deed of the husband, the wife is recognized as having a present, subsisting, and continuing interest in the maintenance

<sup>1</sup> April Term, 1874, Cent. L. Journal, Sept. 24, 1874. *Walters v. The People*, 21 Ill. 178. We may be permitted to suggest that the practice of requiring a married woman to sue by “ next friend ” is a very unnecessary proceeding. No good or valid reason can be assigned for the continuance of such fictions of law. If the wife has any rights she should be allowed a remedy, and that directly in her own proper person, without the intervention of third persons or fictions of law.



and preservation of the benefits of their possession, and that she has such a right in the land, connected with the right of possession, that when that right is violated she is entitled to claim the protection of the Courts.

“In the present case, the husband has undertaken, in contravention of the express prohibition of the constitution and the statute law, to convey the entire title of the homestead tract, without the consent and against the will of the wife. It is now a rule of property, made permanent by the fundamental law, that every head of family is deprived of the right to alienate the homestead unless his wife joins in the conveyance. It follows that such conveyance is absolutely void, and communicates no title to the purchaser, so far as it abridges or interferes with the wife’s homestead right; and the wife, by her next friend, has such interest in the preservation of the homestead as entitles her to invoke the protection of a Court of chancery, by bill to quiet title, to have the cloud upon her rights removed, and her homestead rights declared.”

According to the case in Wisconsin, there is an unquestionable legal right secured, by positive enactment, to married women, yet they are without a remedy in the very case where a remedy is most required.<sup>1</sup> In the State of Mississippi, the rule as announced in Wisconsin is followed, the Court holding, under the statute of that State, that the wife has not such an interest in the homestead during the lifetime of the husband, as that she can appeal to a Court of equity for its protection, and that the husband has the power to alienate the homestead without the concurrence of the wife.<sup>2</sup> It is hard to perceive the reason of the rule, which holds that where the husband abandons his wife, and withdraws his care and protection from her, that in law she is worse off than where the husband dies; for in either case the husband is virtually dead to her. Yet this is the apparent state of the law in Wisconsin, for the Court held, in the case of *McCabe v. Mazzuchelli*,<sup>3</sup>

<sup>1</sup> See also the case of *Taylor v. Hargous*, 4 Cal. 273, and the reasoning of the Court in that case. Also, see *Bartholomew v. Hook*, 23 Cal. 277.

<sup>2</sup> *Thom v. Thom*, 45 Miss. 263; *Cook v. McChristian*, 4 Cal. 25; *Moss v. Warner*, 10 Cal. 298.

<sup>3</sup> 13 Wis. 478, 480.

which was an action of ejectment, that where a man held land under a certificate of school and university land commissioners, for which he had paid, but had not received a patent or conveyance, and who used the said land as his homestead, (his wife and child continuing to reside thereon till commencement of the suit, he having died in the meantime in California) conveyed all his interest and title to a third person without the signature and consent of his wife, it was held that such conveyance was void.<sup>1</sup>

Where the husband has abandoned his wife, leaving her in possession of the homestead, but failing to provide any support for her, if she be wrongfully ousted from the possession of the homestead, she is entitled to a standing in Court to maintain a suit in her own name for the assertion of her rights in respect of her homestead, and that even during the lifetime of her husband.<sup>2</sup>

So, in Michigan, Nevada, and Iowa, the more equitable and reasonable rule prevails: the wife is permitted to sue in her own name, and maintain her homestead rights.

Thus, in Michigan, where a married man was in possession of land under a contract to purchase, and surrendered such contract without the consent of the wife, it was held that such surrender was invalid, and that the wife might file a bill in equity in her own name, and have a specific performance of the contract.<sup>3</sup>

In Nevada, it is held that the constitution and the law having given the wife certain rights, she can always assert those rights, and this is so even where the legislature has failed to point out any particular manner in which she shall assert them. "She may come into a Court of equity according to the established forms and usages of that Court, and obtain any equitable relief to which she is entitled."<sup>4</sup>

In Iowa, the same liberal interpretation of the statutes in relation to the wife's right of being heard, in protecting her

<sup>1</sup> See also, to same effect, *Barton v. Drake*, Sup. Ct. Minn., 1875, reported in *Cent. L. Jour.*, Vol. 2, No. 19, p. 308.

<sup>2</sup> *Love v. Moyneham*, 16 Ill. 277; *Mix v. King*, 55 Ill. 438; *Smith v. Kehr*, 2 Dillon 63.

<sup>3</sup> *McKee v. Wilcox*, 11 Mich. 358.

<sup>4</sup> *Goldman v. Clark*, 1 Nev. 607; *Mix v. King*, 55 Ill. 438.

homestead rights, finds expression in the decisions of the Courts of that State. Thus, where the wife claimed the right to redeem the homestead from foreclosure sale, which was resisted on the ground that she had no title in the property,<sup>1</sup> the Court, in decreeing her right to redeem, said: "The right of the wife to the homestead of the husband, and her interests in it, are present, fixed, and substantial: they are not merely possible, remote, or contingent. Her rights and interests are in possession and enjoyment, and not merely in expectancy or dependent. The husband and wife are, as to the homestead, practically joint tenants, subject to certain limitations for the benefit of children, etc. The husband cannot alienate the homestead, nor even his own interest in it, except the wife concur in signing the conveyance. Can it be said that she has no 'interest in' that, the present possession of which she enjoys, the title to which cannot be imparted without her consent, and the alienation of which can only be done by her joining in the conveyance?"<sup>2</sup>

So, in Missouri, it is held, per Dillon, J., in a bankruptcy case, that, "if it be necessary that the exemption (homestead) should be applied for in the name of the husband, the Court would allow her (the wife) to apply in his name," (the husband had fled the country) so as to prevent the amount from going into the hands of the assignee.<sup>3</sup>

<sup>1</sup> The claim of the wife to redeem the homestead was urged under a statute of that State, which authorizes the property of a married woman to be redeemed from tax sale at any time within one year after the removal of the disability of coverture.

<sup>2</sup> *Adams v. Beal*, 19 Iowa 67; *Chase v. Abbott*, 20 Iowa 154.

<sup>3</sup> *Smith v. Kehr*, 2 Dill. 63.

## CHAPTER XIII.

## EXEMPTIONS UNDER THE BANKRUPT LAW.

## 1. REALTY.

## 2. PERSONALTY

§ 457. **The several statutes passed.**—The fourteenth section of the United States Bankrupt Law of March 2d, 1867,<sup>1</sup> excepts from the operation of the assignment of a bankrupt's estate his necessary household and kitchen furniture, and such of his other articles and necessities, not exceeding in value in any case \$500, as shall be designated and set apart by the assignee, having reference in the amount to the bankrupt's family, condition, and circumstances; also, his wearing apparel and that of his wife and children, and his uniform, arms, and equipments, if he is or has been a soldier in the militia, or in the service of the United States, and such other property as is or shall be exempt from attachment or execution by the laws of the United States, and such other property, not included in the foregoing exceptions, as is exempted by the laws of the State in which he is domiciled, to an amount not exceeding that allowed by such State exemption laws in force in the year 1864. "And in no case shall property hereby exempted pass to the assignee, or the title of the bankrupt thereto be impaired or affected by any of the provisions of this act."

By an amendatory act, passed on the 8th of June, 1872, this provision was changed so as to give the bankrupt the benefit of exemptions under State laws in force in 1871.

On the 3d of March, 1873, Congress passed another act, relating to the same subject-matter as follows :

<sup>1</sup> 14 U. S. Stats. 522, 523.

“That it was the true intent and meaning of an act, approved June 8th, 1872, entitled, etc., that the exemptions allowed the bankrupt by the said amendatory act should, and it is hereby enacted that they shall, be the amount allowed by the constitution and laws of each State respectively as existing in the year 1871; and that such exemptions be valid against debts contracted before the adoption and passage of such constitution and laws, as well as those contracted after the same, and against liens by the judgment or decree of any State Court, any decision of any such Court rendered since the adoption and passage of such constitution and laws to the contrary notwithstanding.”

**§ 458. This Act of March 3d, 1873, has been held to be unconstitutional and void on several grounds, as follows :**

1st. To declare what the law is, or has been, is a judicial function.<sup>1</sup>

2d. It is unconstitutional and void in so far as it attempts to exempt property from execution issued upon “debts contracted before the adoption and passage of such constitution and laws,” or from “liens” of “judgment or decree of any Court.”

3d. It does not provide “that the exemption laws as they exist shall be operative, and have effect under the bankrupt law, but that in each State the property specified in such laws, whether actually exempted by virtue thereof or not, shall be excepted. It in effect declares by its own enactment without regard to the laws of the State,” that there shall be one amount or description of exemption in one State, and another in another State.<sup>2</sup>

It also changes existing rights between debtor and creditor,<sup>2</sup> but held constitutional as to all cases where petition in bankruptcy was filed after the passage of the Act.<sup>3</sup>

<sup>1</sup> In re Dillard, 9 Bank Reg. 8; Cooley Const. Lim. 94.

<sup>2</sup> In re Deckert, 13 Am. Law Reg. 624; Gunn v. Barry, 15 Wallace 610; Homestead Cases, 22 Grattan 266; In re Dillard, Nat. Bank. Reg., Vol. 9, p. 8. Per contra, see In re Jordan, 8 Bank. Reg., 180, per Dick, J. In re Kean, 8 Bank Reg. 467, per Rives, J. In re Smith, Id. 401, 427; Walker v. Whitehead, 16 Wallace 314; Olcott v. Supervisors, 16 Wallace 678.

<sup>3</sup> In re Jared, Everett, 9 Nat. Bank. Reg., 90.

**§ 459. Practice and proceedings in United States Courts.**—The Act of Congress of May 19th, 1828, Sec. 3,<sup>1</sup> had provided that the proceedings on execution in the Courts of the United States should be the same as were then used in the Courts of each State; and had empowered the Courts of the United States by rules of practice to make such proceedings conformable to any changes thereafter adopted by the legislation of the respective States. Through this act, and subsequent rules of practice adopted as authorized by it, the practice in the Federal and State Courts in 1864 was in general the same as to the exemption of the property of debtors. The laws of the several States exempted personal property to an amount varying in value from \$100 to \$2,000, and exempted real property extending in value from \$300 to \$5,000. In several of the States since the year 1868, the real estate exemption may exceed in value this last sum, as by recently adopted constitutions, any increase in value after selection or improvements shall not subject the homestead to forced sale, even though it subsequently exceeds the maximum allowed when such selection was made.<sup>2</sup>

**§ 460. Constitutionality of clauses adopting the exemption laws of the several States.**—The constitutionality of that part of the fourteenth section of the bankrupt act adopting the exemption laws of the several States has been called in question, and in a number of decisions has been sustained, on the ground that it enacted a uniform rule in allowing a bankrupt the exemption, as to amount and the estate out of which it was to be taken, and the description of person to whom it was to be allowed, as fixed by the State laws in force on the passage of the bankrupt act.<sup>3</sup>

<sup>1</sup> 4 U. S. Stats. 281.

<sup>2</sup> Texas—Constitution and Act of August 15th, 1870. Kansas—In re Terteling, 2 Dill C. C. R. 339. Nebraska—Bartholomew v. West, 2 Dill C. C. R. 291. Georgia—Constitution of 1868, real estate, \$2,000; personal property, \$1,000. Florida—Constitution of 1868, in country, 160 acres; town, one-half acre, with improvements, and \$1,000 personal property. In Kansas, real estate, \$5,000; personal property, \$2,000.

<sup>3</sup> Ex parte Beckerford, 1 Dill. C. C. R. 45. In re Daniel Deckert, 13 Am. L. Reg. 624; In re Geo. W. Dillard, 9 Bk. Reg. 8. See also Peck v. Jenness, 7 Howard 612; In re Appold, 7 Am. L. Reg. 624.

Waite, C. J., in delivering the opinion of the Court in the case of *Deckert*, after quoting Art. 1, Sec. 8, of the Constitution of the United States in relation to Congress's power to "establish uniform laws on the subject of bankruptcies throughout the United States," said: "A law, therefore, to be constitutional must be uniform. Every rule it prescribes for one it must for all. It must be uniform in its operations, not only within a State, but and among all the States. If it provides that property exempt from execution shall be exempt from assignment in one State, it must in all. If it specially sets apart for the bankrupt certain property or certain amounts of property in one State, without regard to exemption laws, it must be the same in all. If it provides that certain kinds of property shall not be assets under the law in one place, it must make the same provision for every other place within which the law has effect."

"The power to exempt from the operation of the law property liable to execution under the exemption laws of the several States, as they were actually enforced, was at one time questioned, upon the ground that it was a violation of the constitutional requirement of uniformity; but it has thus far been sustained, for the reason, that it is made a rule of the law to subject to the payment of debts, under its operation, only such property as could, by judicial process, be made available for the same purpose. This is not unjust, as every debt is contracted with reference to the rights of the parties under existing exemption laws, and no creditor can reasonably complain if he gets his full share of all that the law, for the time being, places at the disposal of creditors. One of the effects of a bankrupt law is that of a general execution issued in favor of all the creditors of the bankrupt, reaching all his property subject to levy, and applying it to the payment of all his debts, according to their respective priorities. It is quite proper, therefore, to confine its operation to such property as other legal process could reach. A rule which operates to this effect, throughout the United States, is uniform within the meaning of that term, as used in the Constitution."



In the case of *Ex parte Beckerford*,<sup>1</sup> Krekel, J., after discussing the other questions presented in the case, said: "The second question presented and urged with earnestness is the unconstitutionality of that part of Sec. 14 of the bankrupt law making the homestead exemption." "It is insisted that the fourteenth section, already cited, having adopted the exemption laws of the State in which the bankrupt is domiciled, and these exemptions having no regard to uniformity, violate the constitutional provision authorizing uniform laws throughout the United States to be passed. It is obvious, from the language employed, that the uniformity here referred to was a uniformity among the States. If Congress saw cause to pass bankrupt laws under the grant of power referred to, the injunction is that they shall be uniform throughout the United States. So far as the distribution of the bankrupt's assets—the point under consideration—is concerned, the law is uniform. When viewed with reference to the State exemption laws, there is a uniformity which, on reflection, readily suggests itself. Though the States vary in the extent of their exemptions, yet what remains the bankrupt law distributes equally among the creditors. Nor does the bankrupt law in any way vary or change the rights of the parties. All contracts are made with reference to existing laws, and no creditor could recover more from his debtor, under the State laws, than the unexempted part of his assets—the very thing that is attained by the bankrupt law, which, therefore, is strictly uniform."

**§ 461. Construction of statutes under bankrupt law.** The Courts of the United States in bankruptcy matters, in dealing with State exemptions, follow the interpretation given to such State exemption laws by the Courts of the State where the bankrupt has his domicile.<sup>2</sup> Thus in the case of *In re Dillard*,<sup>3</sup> Bond, J., said: "The Supreme Court of the

<sup>1</sup> 1 Dill. C. C. 45.

<sup>2</sup> *In re Tertulling*, 2 Dillon 341, U. S. C. C., E. Dist. Va., Oct. 31, 1873; *Edmonston v. Hyde*, 7 Bank. Reg. 4, per Sawyer J.; Sup. Court U. S., per Field J., in *Massey v. Allen*, 7 Bank. Reg. 401.

<sup>3</sup> 9 Bk. Reg. 8.



State has determined there is no property in Virginia exempt from levy and execution upon debts created antecedent to the passage of that statute, and, therefore, there can be none under the bankrupt law which follows the exemption laws of the States."

**§ 462. The policy of the bankrupt act** is that the bankrupt shall not be put in any worse condition than that previously occupied by him under State exemption laws, and to extend to him the benefits of its own provisions in relation to the exemptions allowed.

"Its manifest purpose is to leave him on the surrender of all his assets for the benefit of his creditors, a sufficient amount according to his condition in society, not to be reduced to instant and abject destitution, whereby he, and it may be, his dependent and helpless family, are stripped of food and home, and the means of procuring either."<sup>1</sup>

**§ 463. Liberal construction given to exemption clause of bankrupt act.**—The Federal Courts in construing the exemption clauses of the bankrupt act treat them liberally ;<sup>2</sup> "in view of their benevolent and humane character," they "are entitled to be liberally viewed by the Courts."<sup>3</sup>

**§ 464. Jurisdiction of U. S. Courts.**—When the United States Courts, under the bankrupt act, have acquired jurisdiction of the estate of a bankrupt, the State Courts lose jurisdiction of all claims against him provable under the bankrupt act, except specific liens.<sup>4</sup>

But it would seem that such jurisdiction is not exclusive of the right of the assignee in bankruptcy (who acquires title and right of possession of property under the bankrupt act)

<sup>1</sup> Chicago Legal News, Nov. 14th, 1874, p. 62.

<sup>2</sup> In re Williams, 5 Law Reporter 155, U. S. C. C. Mass.

<sup>3</sup> Cox v. Wilder, 2 Dillon 49.

<sup>4</sup> Backman v. Packard, 2 Sawyer C. C. R. 264 ; In re Quinike, 2 Bissell C. C. R. 354 ; Stemmons v. Burford, 39 Texas 352 ; In re Merchants' Insurance Co., 3 Bissell C. C. R. 162 ; Martin v. Berry, 37 Cal. 208 ; Van Nostrand v. Carr, 30 Ml. 128.

to sue in a State Court, as for the recovery of property transferred in fraud of that act.<sup>1</sup>

A sale under execution out of a State Court, pending proceedings in bankruptcy of judgment debtor, passes no title.<sup>2</sup>

Yet it is said, in another case, that a State Court has no jurisdiction of a bill in equity, filed by an assignee in bankruptcy, or to set aside a conveyance made by a bankrupt in fraud of the act. "Courts of equity must have complete control over all the matter in controversy, directly or by coercion of the parties; and when this does not exist, as in the case of an assignee, jurisdiction will be denied." "The jurisdiction of the Courts of the United States are exclusive."<sup>3</sup>

**§ 465. Where specific liens have been created by proceedings in the State Courts,** before the proceedings in bankruptcy have been instituted, the U. S. Courts will not interfere on behalf of the bankrupt in restraining the sale of such property under such lien. Thus, where a bankrupt applied to the Court in bankruptcy for an order to the assignee, requiring him to set apart certain real estate as his homestead, and for an injunction restraining a creditor—who had recovered a judgment and issued an execution thereon prior to the bankruptcy—from proceeding to sell the property, the application was denied. The reasons assigned were, that if the property in question was, and is, a homestead, the title is unaffected by the bankrupt act. If it is not a homestead, the creditor who has a lien to its full value is the only person interested to establish the fact. If it has been wrongfully seized in execution, the bankrupt has the same rights before the State tribunals as any other person whom it is sought to deprive of a lawful homestead.<sup>4</sup>

<sup>1</sup> *Cook v. Waters*, 9 Bank Reg. 155 (Court of Appeals, N. Y.); *Johnson v. Bishop*, 11 Woolworth's C. C. R. 324. See, also, *Martin v. Berry*, 37 Cal. 208; *In re Dillard*, 13 Am. Law Reg. 624. As to the right of the assignee to sue in the State Court, rights and powers of the assignee, and jurisdiction of the State and Federal Courts, discussed by Justice Miller of U. S. C.; *Johnson v. Bishop*, 1 Woolworth 324.

<sup>2</sup> *Stemmons v. Burford*, 39 Texas 352.

<sup>3</sup> *Voorhis v. Frisbie*, 12 Am. Law Reg. 108, Feb., 1873.

<sup>4</sup> *Moore v. Morrow*, 28 Cal. 551; *In re Hunt*, 5 Bank Reg. 493.

**§ 466. Specific lien under State law valid as to exempt property, though giving preference to creditors.** So, in the case of *Rix v. Capitol Bank*,<sup>1</sup> it was held, under the provisions of the constitution of Kansas in relation to the homestead exemption, that the title to property occupied by a bankrupt and his family as a residence, at the time of the filing of the petition in bankruptcy, did not pass to or vest in the assignee, but remained in the bankrupt; therefore the assignee had no standing in Court upon a bill filed to have a prior mortgage, otherwise valid, set aside, because it gave a preference, contrary to the thirty-fifth section of the bankrupt act; nor to restrain the foreclosure of such mortgage in the Courts of the State. Dillon, Circuit J., said: "The property in question being admitted to be the homestead of the bankrupt at the time of the commencement of the proceedings in bankruptcy, and as such being exempt by the constitution of the State 'from forced sale under any process of law,' the same was 'exempted' by the bankrupt act 'from the operation of the provisions' of that section, and the 'title' thereto did not 'pass to the assignee,' nor was the title of the bankrupt thereto impaired or affected by the provisions of the bankrupt act."

The laws of Kansas recognizing the validity of a lien on the homestead given by husband and wife, the mortgage so executed within four months of the proceeding in bankruptcy is not void as giving preference to creditors. "Such mortgage did not affect the right of the owner of the homestead to exemption, which, as against general creditors, and as against the assignee, continued to exist, notwithstanding such mortgage."

**§ 467. Acquisition of homestead by fraudulent means as against creditors.**—The acquisition of a homestead by a debtor, even though he applies the moneys arising from sales of goods or property, which of right belong to his creditors, to pay off liens on such homestead, will not invalidate such acquisition.

<sup>1</sup> 2 Dill. C. C. 369; *Schlitz v. Schatz*, 2 Biss. C. C. 248.

Thus, where in November, 1866, a bankrupt purchased property and claimed as a homestead, for the sum of \$3,000, borrowing \$2,000 on mortgage on the property, and raising \$1,000 on his note. On the 6th of December following, he sold his entire personal estate for \$3,000, and with the proceeds paid the mortgage and note. On January 12th, he declared the real estate homestead, in accordance with the laws of the State of California. At the time this declaration was made he was indebted in the sum of \$2,056, from which indebtedness, under this state of facts, he applied to the Bankrupt Court to be discharged.

Held, per Hoffman, J., upon the authority of *Randall v. Buffington*,<sup>1</sup> and *Culver v. Rogers*,<sup>2</sup> "that under the laws of California, the exemption of the homestead from forced sale remains, notwithstanding that an insolvent has devoted moneys which equitably belong to all his creditors, to the payment of a debt which was a lien on the homestead. A general creditor of an insolvent cannot subject a homestead to liabilities for his debts, notwithstanding that the insolvent had applied property in his hands to the payment of a debt which was a lien on the homestead."<sup>3</sup>

**§ 468. Fraudulent assignment of title to wife of claimant, not estopped from claiming homestead.**—Nor is the homestead claimant estopped from claiming a homestead in property where a bond for title to the land was taken in the name of a firm of which the claimant was a member, and on which he builds a house, making it his home. The firm assigned the bond for title to this lot to the father of the claimant bankrupt, who procured the legal title, and thereupon conveyed the property to the bankrupt's wife without consideration, after the bankruptcy of the firm of which the husband was a member.

It was contended that if the husband (West, of West & Lewis) were otherwise entitled to the homestead, the right had been lost by reason of the fraudulent assignment of the

<sup>1</sup> 10 Cal. 493.

<sup>2</sup> 28 Cal. 526.

<sup>3</sup> In re Henkel, 2 Sawyer, C. C. 305.

title bond to his father, and the subsequent conveyance to the wife.

Dillon, J., said: "If it had appeared in the other suit (setting aside the conveyance to the wife as fraudulent) that the property was exempt as a homestead, and that the creditors had no claim upon it, the Court would undoubtedly have dismissed the bill of the assignee. But I have elsewhere held<sup>1</sup> that where a fraudulent conveyance is made and set aside at the instance of the assignee, the husband or head of family is not estopped to set up the right of homestead exempt."

"Where the assignee applied for an order to sell the property, it was competent for the husband to resist it, as he did, on the ground that the property was his homestead, and exempt as such."

It was further held, that the right to such exemption was not lost by the delay of the husband to claim it until an order is applied for by the assignee in bankruptcy to sell it for the benefit of the estate.<sup>2</sup>

**§ 469. Homestead property conveyed to son in fraud of creditors.**—So, in the case of *Penny v. Taylor*,<sup>3</sup> where the father conveyed homestead property to his son in fraud of creditors, it was said that although a conveyance by a father to his son may be void as to creditors on account of fraud, nevertheless the father is not thus deprived of his homestead.

The general rule seems to be that the fraudulent conveyance of the homestead by a bankrupt does not estop him from claiming such homestead in the premises, after such conveyance has been annulled and decreed as fraudulent and void as to creditors.<sup>4</sup>

Thus, M and wife conveyed their farm to their daughter on the 2d of December, 1869: subsequently, M was

<sup>1</sup> *Cox v. Wilder*, 2 Dill. 45.

<sup>2</sup> *Bartholomew v. West*, 2 Dill. 293.

<sup>3</sup> *Penny v. Taylor*, 10 Bank. Reg. 203.

<sup>4</sup> *McFarland v. Goodman*, 13 Am. Law Reg. 697; *Pacific L. Rep.*, June 23d, 1874; *In re Pratt*, Mich. U. S. Dist. Court; also in *Cent. Law Journal*, June 11th, 1874; *In re Detret*, 14 Am. L. Reg. 166; *Volger v. Montgomery*, 13 Am. Law Reg. 244; *Cox v. Wilder*, 2 Dill. 49; *Bartholomew v. West*, 2 Id. 293; *Smith v. Kehr*, 2 Id. 63.

declared a bankrupt, when his assignee filed a bill in equity to set aside and vacate the deed as fraudulent and void as to creditors, which resulted in a decree in February, 1872, setting such deed aside. The land in question had been occupied by the bankrupt and his wife for upwards of thirty years as a homestead. The only money consideration was \$100, but it was agreed that M and his wife were to continue to occupy the premises as a homestead during their natural lives, and were to be supported by their said daughter during their joint lives. Under the order of the Court, the assignee sold the premises, subject to any legal claim of the bankrupt to a homestead therein, to the plaintiff, who brought suit in ejectment against the bankrupt for that portion claimed as homestead. It was held, that the purchaser at such sale was not entitled to recover; that the deed being set aside, the title reverted to the bankrupt, and then passed to his assignee, subject to the exemptions of the bankrupt act, as if the deed had never been made. It was further held, that the fact that the deed of the bankrupt to his daughter reserved the right to occupy the land as a homestead during his life, strengthened the foregoing conclusions, but were not necessary to it.<sup>3</sup>

**§ 470. Joining of the wife in the fraudulent deed does not estop her from claiming homestead.**—It was further held, that the voluntary joining of the wife in a deed, which is afterwards set aside as fraudulent, does not prevent her on such setting aside from claiming her dower or homestead.

Hopkins, J., said: "The deed, under such circumstances, did not extinguish their homestead rights. That agreement they could enforce, as against their grantee, and a Court of equity would set aside the deed in case of her refusal to perform it. So that the equitable right of the bankrupt to this property as a homestead had not been unconditionally surrendered or placed where he could not enforce it against his grantee, if the deed had not been annulled in the interest of the creditors. But I do not wish to be understood as resting my decision alone on this ground. I think the decedent's homestead rights sustainable upon broader and more compre-

<sup>3</sup> *McFarland v. Goodman*, 13 Am. L. Reg. 697.

hensive grounds. The deed being set aside, and the creditors being restored to their rights, as they existed before the deed, upon what principle should the bankrupt be denied his rights, as they were before the deed? In the case of a homestead, there is a peculiar reason for the adoption of this rule. The homestead is exempted for the benefit of the family of the debtor; he cannot deprive them of it without the signature of his wife. To transfer it requires their joint deed. Her right in it is not simply inchoate, like dower, but present, possessory, and indefeasible by her husband. Neither can convey it except by joining with the other in the deed."

"It was said that she voluntarily executed this deed with her husband; that she probably knew of his unlawful purpose. Suppose that to be the case—I do not think it alters her rights. The position of a wife is such, and the influence of the husband over her, that she is not answerable for his frauds." <sup>1</sup>

§ 471. The rule seems to be firmly established, in relation to illegal preferences under the bankrupt law, that where a conveyance is made of the homestead giving such preference, and is subsequently set aside on the ground of such illegal preference, that the grantors are not estopped from asserting their right of exemption, except as to the grantee therein.

This subject of the fraudulent transfer of property received careful and studied consideration at the hands of Dillon, J.,<sup>2</sup> in the case of *Cox v. Wilder*,<sup>3</sup> wherein one Saur and wife made a conveyance of the farm of Saur, on which he and his family resided, to Wilder, within six months of the bankruptcy. Cox was the assignee in bankruptcy of Saur, who

<sup>1</sup> *McFarland v. Goodman*, 13 Am. L. Reg. 697.

<sup>2</sup> The opinion of Judge Dillon, in relation to the law of homestead, is entitled to great weight, from the fact of the well known ability of that able jurist, and from the study and examination which he has brought to bear on the subject. Few, if any, judges have bestowed upon this subject the same careful examination and thought; hence, all his opinions reflect the result of an enlightened mind deeply imbued with the subject. See 1 Am. Law Reg. (N. S.) 641 and 705, Sept. and Oct., 1862, to which authority we are indebted for many valuable suggestions.

<sup>3</sup> 2 Dill. 47.



brought suit in the District Court to set aside the conveyance to Wilder. The District Court found that the conveyance was fraudulent and void as to creditors, and decreed that all of the rights of Wilder and of Saur and his wife, who were defendants in the bill, be divested out of the defendants, and be vested in the plaintiff, as assignee, free and discharged of the homestead claim of the husband (Saur) and the dower right of the wife ; from which decree the defendants appealed.

Dillon, J., after discussing the question of the wife's right of dower in the property, said that the same considerations applied to the homestead right, and that the questions presented would be solved when it was determined "under whom the assignee claims, and to whose rights he succeeds" ; continuing as follows :

"He claims not under, but adversely, to the deed of Wilder. He succeeds to all the interests of the bankrupt, and represents his creditors so far as to enable him to attack conveyances made by the bankrupt in fraud of their rights. He claims that the deed is void as to creditors, and on this ground alone he attacks it, and upon this ground alone has he any right to the property. He says it is void as to creditors, because fraudulent; and for this reason asks to be invested with the title which it fraudulently conveyed. He cannot claim under it, and must claim against it. When it is decreed to be fraudulent and void at his instance, how can he set it up to defeat the right" claimed ? "Such a position involves this inconsistency, viz : that it asks that the same instrument be held void as to creditors, and then in their favor held valid" as to the claim of homestead and dower.

"These exemptions, in view of their benevolent and humane character, are entitled to be liberally viewed by the Courts, although, of course, the right must be claimed under the qualifications and conditions prescribed by the statute. Now, by the bankrupt act, the assignee takes 'all the property conveyed by the bankrupt in fraud of his creditors' (Sec. 14); that is, takes it as fully and effectually as if the fraudulent conveyance had not been made. As respects the assignee, the property is still the bankrupt's at the date of the bankruptcy, and the assignee takes under or through him." "Ex-



cept for the deed to Wilder, the bankrupt would be entitled to the exemption. But as we have seen, the assignee does not and cannot claim under that deed, but in hostility to it; and when it is avoided, and the title placed in the assignee, I do not think (in view of the purpose of the exemption) that the husband is estopped, as against the assignee, to claim the right to the homestead, or the value, to the extent given by statute. This view does not make the estate any less than if the fraudulent conveyance had not been made, while the opposite view gives the creditors a profit out of the attempted fraud, at the expense of the family for whose benefit the exemption is mainly, if not wholly, provided." "If the law gave to a single man the right to his exemption, it would accord to the natural desire to punish fraud, to visit a penalty upon him; but to denounce a forfeiture of the homestead where there is a family, subverts the policy on which the exemption is provided and allowed."

The same rule obtains where husband and wife separated, and the husband, by deed of trust, conveyed certain property to trustees for the benefit of the wife; and subsequently they lived together and condoned the past differences; and such deed being declared void as against creditors, the conveyance, though void against creditors, being good as between husband and wife, conveying the husband's right of homestead. Held, that the wife was entitled to the homestead.

"The husband fled the country, and abandoned his wife, leaving her, however, in the actual possession of the homestead property." <sup>1</sup>

**§ 472. Apparent exception to foregoing rule.**—The language used by Judge Bond in a part of the opinion filed in the case of *Dillard*,<sup>2</sup> would appear to be in conflict with the foregoing principles, but an examination of the facts in that case will show that, under the Virginia statute and the decisions of the Supreme Court of that State, the homestead claimant was not entitled to the exemption, as there were prior debts or liens which had become such before such claim

<sup>1</sup> *Smith v. Kehr*, 2 Dill. C. C. 63.

<sup>2</sup> 9 Bank. Reg. 8. See, also, *Homestead Cases*, 22 Gratt. 266.

had been made. And, further, the claim of homestead exemption on the part of the bankrupt was made under the amendment to the Bankrupt Law of 1873, which was declared to be unconstitutional and void, and without the assistance of which he was not entitled to a homestead.<sup>1</sup>

**§ 473. Deed of trust of homestead to preferred creditor—Surrender.**—The same rule we have been considering, in relation to fraudulent preferences, is carried a step further, and is applied where a preference is given by a deed of trust of the homestead to a creditor, and such preference is surrendered without suit, (under Section 23 of the bankrupt act) allowing all the creditors to participate in the distribution of the fund, the property being sold under the deed of trust, the money arising from the sale will be set apart to the bankrupt in lieu of homestead ; on the ground that the same effect will be given to a voluntary surrender of such a deed as if a setting aside had taken place. The rule applying in this case, “that the conveyance being for the benefit of the grantees alone, could not operate in favor of the assignee and general creditors, both of whom claim adversely to the deed.”

The facts on which the foregoing principles are based are as follows : “The bankrupt filed his petition praying to have \$1,500 set apart to him out of the assets of the estate in lieu of homestead. The bankrupt was indebted to a firm, which sued him and recovered judgment ; to delay the collection whereof, he conveyed and assigned his property, including his homestead, to one Meyer, in trust for himself and certain other creditors named in the deed ; within four months after the making of this conveyance he was declared bankrupt on creditor’s petition, the said Meyer and one Hamilton were elected assignees ; Meyer presented his own as well as the creditor’s claims named in the trust deed for allowance as secured. Hamilton, the co-assignee, objected, alleging that an illegal preference was attempted thereby to be secured, and that the trust deed was on that account void ; Meyer, to avoid the objection, executed an instrument in writing,

<sup>1</sup> 9 Bank. Reg. 8. See, also, Homestead Cases, 22 Gratt. 266.

agreeing that if the objections were withdrawn and the claim allowed to be proven up as secured, the proceeds derived from the disposition of the property should be equally distributed among all the creditors of the estate; the objections were withdrawn and the claims allowed as secured; a sale was ordered by the Court under the deed of trust, in which the assignee joined; the proceeds of sale were paid into the estate and treated as part of the general fund in Court. It was contended, on the part of the bankrupt, that the surrender of the preference by Meyer had "the same effect as the setting aside of the deed would have, and that he was entitled to an allowance at least to the extent that the homestead sold for." On the part of the assignee it was contended, "that as the claim was allowed as secured, and the deed of trust held valid, as shown by the sale under it, the proceeds must be treated, so far as the bankrupt is concerned, as discharged from all claim on his part." Kerkel, D. J., said: "The 23d section of the Bankrupt Law provides that any person having received a preference shall not prove the claim on account of which the preference was given, nor shall he receive any dividend therefrom until he shall first have surrendered to the assignee all property, money, or benefit. The manner in which this surrender shall be made the law has not determined. In the case before the Court, Meyer was not permitted to prove his claim or have any benefit therefrom, until, by an instrument in writing, he had agreed that the proceeds of his preference should become a part of the general estate of the bankrupt. This may be treated as a surrender under the 23d section, and is not a mere consent on the part of Meyer for the unsecured creditors to participate in the proceeds of his preference. What effect had this surrender on the rights of the bankrupt? If the reasons given by the authorities cited, that the conveyance was for the benefit of the grantee and could not operate in favor of the assignee or general creditors, both of whom claimed adversely to the deed, be sound, then it must follow that the same effect must be given to this relinquishment of Meyer as the setting aside of the deed, had it taken place, would have had. I am the more inclined to give this effect to the relinquish-

ment under consideration from the persuasive force of the Missouri case cited, and because of the harmony thus established between the Federal and State decisions, furnishing a permanent rule of property." "The homestead having been sold at the trustee's and assignee's sale for \$725, this amount will be set apart to the bankrupt in lieu of his homestead."<sup>1</sup>

**§ 474. Disposing of homestead and occupying store, claiming it as exempt.**—A merchant will not be permitted to dispose of his homestead for cash, in view of insolvency, and move his family into his store in order to secure such store as exempt. Though his right to sell his homestead be undoubted, yet he will not be permitted to make the change to the prejudice of creditors.

Thus, where the bankrupt had, for several years, been the owner and occupant of a comfortable house and lot, continuing such occupancy with his family until about two weeks before proceedings in bankruptcy were commenced against him, when he sold his homestead for cash and moved his family into a part of the store, which was partitioned off, and claimed the store as exempt under the homestead law : held, that this was a fraud against his creditors, and also on the bankrupt act, and ordered that the bankrupt deliver up possession of the premises to the assignee.

Miller, J., said : "He was doing business in a building constructed solely for business purposes, and not having the appearance of a dwelling, with an adjoining building under rent, open to the view of his creditors, when he was purchasing their goods on credit, and occupying at the same time with his family a comfortable homestead ; and at the time his notes for an unusually large increase of stock were maturing, within three days he made all these changes as to his property."<sup>2</sup>

<sup>1</sup> In re Detert, 14 Am. L. Reg. 166, U. S. D. C., West. D. Missouri. The cases referred to in the opinion are Cox v. Wilder, 2 Dill. C. C. 45 ; Volger v. Montgomery, 13 Am. Law Reg. N. S. 244 ; McFarland v. Goodman, 13 Am. Law Reg. 697.

<sup>2</sup> In re Wright, 3 Bissell 359.

§ 475. But an exchange of homestead will, under certain circumstances, be allowed.—Thus, where different parcels of land are owned by a person, on two of which are dwelling-houses, and one of such lots with the dwelling-house exceeding the value allowed by the exemption act is subject to a mortgage nearly equal to its value ; the other lot and the dwelling, occupied by a part of his family, free from liens, if within the limits of the statutory amount, he will be entitled on request to have set off as exempt.<sup>1</sup>

§ 476. Non-liability of homestead for purchase-money under laws of 1864, in Georgia.—It has been held in the State of Georgia, that where a bankrupt had a homestead set off to him under the bankrupt law, by the officials of the Bankrupt Court, that such homestead was not subject to be sold, even for the purchase-money of the same, for the reason that the laws in force under the code, in 1864, did not permit the forced sale of the homestead, even for the purchase-money ; and that the Bankrupt Act of the United States, of March 2d, 1867, vests in the bankrupt, free from his debts, whatever property the State exempted from levy and sale under laws in force in 1864. Therefore, it was held, that a judgment creditor of a discharged bankrupt, though he obtained the judgment before the bankrupt's discharge, cannot levy on and sell the homestead by force of such judgment, though it be for the purchase-money of the same.<sup>2</sup>

§ 477. Where objection is made on behalf of creditors to the exemption of the homestead, as exceeding in value the amount limited in the State exemption law, the bankrupt in such case, as in Ohio, does not take a fee-simple, but only a qualified estate in the homestead. If it is not susceptible of division, it will be ordered sold ; the sale, however, will be subject to the right of homestead in the bankrupt, or he retaining the statutory value of the homestead,

<sup>1</sup> *Manufacturers' and Farmers' Bank of Wheeling v. Bayless*, 1 West L. Mo. 356 ; also 1 Brightly's Fed. Dig. 414.

<sup>2</sup> *Rushin v. Gause*, 41 Ga. 180.

any surplus remaining above such sum will go into the general fund.<sup>1</sup>

**§ 478. Other uses of the homestead than that of a family dwelling,** in those States where there is no limitation on the value of the land and improvements, as in Kansas, Texas, and Nebraska, and some other States, does not destroy the exemption right, although the premises are used, and may have been constructed, for purposes foreign to that of a family dwelling, provided the family occupy a portion of the building as a residence.

Thus, the constitution of Kansas provides that "a homestead to the extent of one acre, in an incorporated town or city, occupied as a residence by the family of the owner, together with all the improvements on the same, shall be exempt from forced sale under any process of law."

Under this constitution, one Tertelling was engaged in the business of manufacturing beer at the time of the commencement of proceedings in bankruptcy against him. He was the owner of the brewery, which stood upon seven town lots, all in one enclosure, the whole being less than one acre of ground. He and his wife and children occupied part of the brewery building as a home, to wit: two north rooms in the first and the second story. The remainder of the building, the south rooms of the first and second story, the basement, sheds, vaults, and ice-house, were used for carrying on the brewery business.

The register found that only the portions of the building occupied by the family were exempt, and those portions used as a brewery were not so exempt; which findings and conclusions were affirmed by the District Court.

On appeal to the Circuit Court, per Dillon, J., the case was reversed, the circuit judge holding that the district judge erred in dividing the same building into two portions, the one portion being considered a homestead and exempt, and the remainder not a homestead, and therefore subject to execution and forced sale. The Court said: "The constitutional provision respecting the homestead exemption is exceedingly

<sup>1</sup> In re Watson, 2 Bank. Reg. 174; In re Beckerford, 1 Dill. C. C. 45.

liberal. to the debtor; but it may admit of some doubt whether it is just towards the creditor. The quantity of land exempted is limited, but there is no limitation on the value of the land exempted, or the value of the (homestead) improvements thereon.

“If the building is occupied as a residence by the family of the owner, it is exempt, whatever its value. The building now in question was thus occupied, and it is all exempt, though a portion of it may have been devoted to other uses. We do not decide that in addition to the house occupied as a homestead, and separate from it, the owner could erect upon the acre upon which his residence is situated a block of stores or a brewery building, (not occupied by the family as a home) and hold it exempt.

“We hold, that the whole house occupied as a home is exempt, though a portion of it may be used and may have been constructed with a view to be used for other purposes. We are of opinion that, upon the facts reported, the entire building is exempt from forced sale.

“The order of the District Court is reversed.”<sup>1</sup>

**§ 479. A bankrupt is entitled to the statutory homestead exemption in a leasehold estate,** under a State statute which provides that property “when owned by the head of a family or wife who shall be a bona fide resident of the State, any of his or her real estate not exceeding 160 acres of farming land, or one lot in town or city in value \$1,000, at the date of such exemption, to be held and enjoined by such party as a homestead.” Thus, where a debtor was declared a bankrupt, he was the owner of an unexpired term of a leasehold estate, the value of which was \$1,490, as appeared from the sale by the assignee. The bankrupt claimed \$1,000 of the proceeds of such sale in lieu of a homestead, which claim was resisted. The District Court allowed the claim, and ordered the amount paid to the claimant. On appeal to the Circuit Court, it was urged “that there can be no such ownership as the law here contemplates in a leasehold estate, and hence no homestead could be carved out of it.” It was

<sup>1</sup> In re Tertelling, 2 Dill. C. C. 341; see Secs. 76 to 78, Ante.



held by the Circuit Court, that "by the exemption laws of Missouri, in force in 1864, a homestead may be set apart to a debtor out of a leasehold in real estate, or when such leasehold is not susceptible of division, he may retain \$1,000 out of the proceeds of it." The following reasons were assigned for such conclusion: "By the seventeenth section of the Missouri statutes relating to executions, it is enacted that leases upon land, for any unexpired term of three years and more, shall be subject to execution and sold as real property."

"The term real property is defined by the thirty-eighth section of the general provisions of the same statute as including every estate, interest, and right in land. These provisions seem to us to solve the question suggested in favor of the bankrupt, entitling him to have a homestead set apart in the leasehold owned by him at the time he was declared a bankrupt."<sup>1</sup>

**§ 480. Alienation by mortgage does not deprive bankrupt of homestead.**—The fact that a bankrupt had mortgaged his homestead to secure the payment of money borrowed anterior to such claim of homestead, does not deprive him of such right of exemption of such homestead.<sup>2</sup>

**§ 481. A member of a bankrupt firm is entitled to a homestead exemption,** when the lot on which the dwelling stands is his individual property, although the lumber and other materials used in building were charged to the firm, and paid with firm funds.

A member of a bankrupt firm filed a petition to have a dwelling-house and lot, occupied by himself and family, set apart by the assignee as exempt property under the bankrupt act, and the laws of Michigan. The lot was the sole property of the petitioner, the house was built of lumber and other materials belonging to the bankrupt firm, and with funds of the said firm, which were charged on the books to the house, and not specifically to the petitioner. At this

<sup>1</sup> In re Beckerford, 1 Dill. C. C. 45.

<sup>2</sup> In re Brown, 3 Bank Reg. 60.



time, the firm was indebted to the petitioner to an amount exceeding the cost of the house, and was considered solvent.

It was claimed, that the house was partnership property, and that there can be no exemption of partnership property under the bankrupt law and the laws of Michigan.

Held, that the house was part of the realty, and as much the separate property of the petitioner as the realty itself; that the firm had no interest or ownership in the house, and, as it was indebted to the petitioner, there could be no claim for reimbursement; that nothing passed to the assignee except any excess there may be in the value of the property in question over \$1,500.<sup>1</sup>

**§ 482. What constitutes a family to entitle bankrupt to the exemption.**—Where a bankrupt, residing in Georgia, rented a house, hired servants, and made his home therein with a widow not related by blood to him, but whom he and his wife had educated and regarded as their adopted daughter, but had failed to adopt her in accordance with law. Held, that he is head of a family and entitled to exemption, as such, of fifty acres of land as a homestead, but is not entitled to five acres additional for each of three children of the widow residing with them, and forming part of the household, inasmuch as he is not legally bound to support them.”<sup>2</sup>

So, an unmarried man, a bankrupt, having orphan children bound to him under the apprentice laws of Texas, and keeping house, hiring servants, and conducting a household, claimed a homestead of 100 acres as head of a family by the laws of Texas. Held, that the bankrupt was not entitled to such homestead as head of a family, but that fifty acres be set apart to him as a citizen under the Texas laws, not to exceed in value \$500.<sup>3</sup>

**§ 483. It is too late to have homestead set apart after property has passed to assignee.**—A failure on the part of the wife of a bankrupt to have a homestead set apart

<sup>1</sup> In re J. F. & C. R. Parks, 9 Bank Reg. 271.

<sup>2</sup> In re Taylor, 3 Bank Reg. 38.

<sup>3</sup> In re Sumners, 3 Bank Reg. 21.

to her for the use of the family under the homestead laws of Georgia, until after the husband has been adjudged a bankrupt, will preclude such exemption being assigned after the property has passed into the hands of the assignee.

Thus, where ejectment suit was brought by Mrs. Lumpkin (the bankrupt's wife) and her children against Eason, the assignee, the record disclosed the following facts: that on the 12th of December, 1868, the premises in dispute had been by the ordinary duly set apart to the wife and children as their homestead.

On the part of defendant, it appeared, that on the 20th of May, 1868, creditors of Lumpkin petitioned to have him declared a bankrupt, and that his estate be taken possession of for their benefit by a temporary assignee. This was done on the 10th of June. On the 16th of June, Lumpkin filed an answer to the petition denying the bankruptcy; subsequently, different proceedings were had, resulting finally in his being adjudged a bankrupt on the 9th of November, 1868; and on the 28th of the same month, an assignee was finally appointed to take charge of his property. It was held, that the wife could not have a homestead in the land of her husband, as against the assignee of the bankrupt, and that the right of the wife and children to a homestead is not such a lien upon the same as follows the land into the hands of a third party acquiring title before the application is made.<sup>1</sup>

**§ 484. A bankrupt is not entitled to a homestead exemption** under the fourteenth section of the bankrupt act, as against claims which are proven against him of a date anterior to the taking effect of State exemption laws, in those States where the exemption law provides that no property shall be exempted from levy and execution for debts contracted or liabilities arising on contracts entered into before such laws took effect.

**§ 485. And such liabilities which may arise will relate back to the date of the engagement to perform such contract**

<sup>1</sup> Lumpkin v. Eason, 10 Bank. Reg. 549; also, 44 Ga. 339.

or duty.<sup>1</sup> Thus, in Missouri, where the homestead statute provides that it "should not apply to any debts or liabilities before" it took effect; it was held, per Dillon, J., that where a public administrator gave an official bond and received personal property of the decedent before the homestead statute went into force, his liability to the heirs and distributees arose in such a sense as to deprive him of a homestead in property acquired after he received the assets of the estate, although it did not appear that at the time the property claimed as a homestead was acquired, the administrator had then converted the assets of the estate which had come into his hands.

It was said "that the bankrupt is not entitled to the homestead exemption; that the claim of the heirs and distributees was a liability contracted before, and in existence when the homestead act was passed."<sup>2</sup>

So, in Massachusetts, the liability of the principal to indemnify his surety was held to relate back to the date when the surety became responsible for the debt of his principal, and not when the payments are made by such surety.

In the case of *Rice v. Southgate*, just cited, Bigelow, C. J., said: "The question in this case is, whether on the facts stated there are any debts proved against the estate of the tenant in insolvency to the amount of \$800," (the statutory limit of the homestead) "which were contracted prior to the passage of the statute of 1855, C. 238, under which he claims to hold the demanded premises as a homestead. If there are, then it is clear that he cannot avail himself of the exemption secured by that statute, because by the third section it is provided that no property exempted, etc., \* \* and all the estate of the debtor which might have been taken on execution against him at the time of the commencement of the proceedings in insolvency, vested in his assignee."

"Under well settled principles, it is clear that the contract of a principal with his surety to indemnify him for any payment which the latter may make to the creditor in consequence of the liability assumed, takes effect from the time

<sup>1</sup> *In re Hook*, 2 Dill. 93; *Rice v. Southgate*, 16 Gray 142; *Gibbs v. Bryant*, 1 Pick. 121; *Appleton v. Bascom*, 3 Met. 169; *Woods v. Sanford*, 9 Gray 16.

<sup>2</sup> *Id.*, 2 Dill. 93.

when the surety becomes responsible for the debt of his principal. It is then that the law raises the implied contract or promise of indemnity. No new contract is made when the money is paid by the surety, but the payment relates back to the time when the contract was entered into by which the liability to pay was incurred. The payment only fixes the amount of damages which the principal is liable under his original agreement to indemnify the surety."<sup>1</sup> "It follows, that the real estate occupied by the insolvent debtor was not exempted from levy on execution at the suit of his surety, who entered into the contract on which he has been held liable to an amount exceeding \$800 prior to the passage of the act under which the tenant now claims a homestead right."

#### WHO ENTITLED TO THE RIGHT.

**§ 486.** No one but the bankrupt can claim the exemption of property under the State laws; if he does not claim it his mortgagee cannot claim it as against the assignee.<sup>2</sup>

It was held, that where a bankrupt makes no claim to have set apart a portion of his property, to which he is entitled under the statute exempting property from seizure and sale under execution, a mortgagee, in a mortgage embracing the property executed by the bankrupt and declared void as to creditors under the statute of frauds, is not in a position which entitles him to have such property set aside as belonging to him by virtue of his mortgage.<sup>3</sup>

**§ 487.** An absconding debtor is not, by such act of absconding, deprived of his right of homestead, so long as his wife and family remain in possession of such homestead, and his assignee in bankruptcy has no right to its possession.

The resident wife will be heard, on petition, to have the

<sup>1</sup> Citing *Gibbs v. Bryant*, 1 Pick. 121; *Appleton v. Bascom*, 3 Met. 169.

<sup>2</sup> *Jones v. Tracy*, *Western Jurist* (July, 1874, No. 3) 107.

<sup>3</sup> *Edmonston v. Hyde*, 7 Bank. Reg. 13.

homestead set aside to her in the proceedings in bankruptcy, and the assignee enjoined from interfering with her right of enjoyment, where he has intruded upon the homestead right.

In contemplation of law, the residence of the absconding bankrupt will be that of his wife and family, until it is conclusively shown that he has acquired another home elsewhere.

Thus, in Michigan, Pratt, the bankrupt, absconded, and was subsequently proceeded against by petition of creditor, and adjudged a bankrupt. The wife of Pratt presented a petition to have the homestead, which, by the laws of Michigan, is exempt "when owned and occupied by any resident of this State," set off to the bankrupt or his family. The assignee, assuming that the wife and children were not entitled to the exemption, had put a person in possession of a part of the homestead, and threatened to deprive them of their home, and refused to set off the premises as exempt.

Upon an order to show cause, the assignee pleaded the foregoing exemption law of Michigan. Withey, D. J., said: "The homestead in question was owned by Pratt, and occupied by his family, up to the time he absconded, and his wife and children have continued to occupy it since. The value of the premises is \$2,000, on which there is a mortgage-lien amounting to something over \$700. When the owner's interest does not exceed \$1,500 in the homestead, it is exempt, subject to any incumbrance there may exist upon it. When the premises do not exceed in quantity the exemption, no selection is required by the statute to be made. The object of the statute is as much to protect the wife and children as the husband. This is seen in the protection to the wife against alienation by the husband without her signing the conveyance, and, in case of his death, the provision for the widow and children."

"While the family remain in the State, occupying the premises as a home, the exemption is secured by the statute, inasmuch as it continues to be owned and occupied by Pratt; while his family reside on it, their occupancy is his occupancy. His claim of a homestead exemption will be

presumed in the absence of a distinct disclaimer, or some act amounting to that."<sup>1</sup>

**§ 488. Homestead subject to trust deed for future advances.**—A bankrupt, who conveys real estate by deeds of trust as security of moneys then loaned, and for future advances, will not be permitted to retain a homestead as against such advances as were made to him subsequent to the filing of a declaration of homestead, under the laws of California requiring such filing, and before notice to the trustee, and where he obtains such advances without disclosing the fact of having filed for record such declaration of homestead.<sup>2</sup>

**§ 489. Exempt property may be sold and conveyed by bankrupt.**—An assignee in bankruptcy has no interest in, and therefore cannot recover property excepted by the fourteenth section of the bankrupt act. Such property the debtor may legally mortgage, sell, or dispose of in any manner he pleases. He may convey such property to a creditor, and such action on his part will not be a violation of the law, nor such a fraud upon other creditors, even though such bankrupt creditor absconds, as will authorize the assignee to proceed against the holder of such property under the section of the act in relation to preferred creditors.<sup>3</sup>

**§ 490. Assignment of exemption will not prevail over vendor's lien.**—The assignment of land, under the fourteenth section of the bankrupt act, as exempt property under the laws of the State, will not prevail over the equitable lien of a vendor for unpaid purchase-money, or any portion thereof.<sup>4</sup>

<sup>1</sup> In re Chas. C. Pratt, Cent. L. Jour., June 11, 1874; Pacific L. Jour., June 1, 1874. Citing Lack v. Rowell, 47 N. H. 46; White v. Clark, 36 Ill. 285; Cox v. Wilder, 2 Dill. 45; Bartholomew v. West, 2 Dill. 290; Titman v. Moore, 43 Ill. 169; Bonnell v. Smith, 53 Ill. 375; Taylor v. Hargous, 4 Cal. 268; Booker v. Anderson, 35 Ill. 66; Volger v. Montgomery, 54 Mo. 577; Am. L. Reg., April, 1874, Vol. 13, 246.

<sup>2</sup> In re Haake, 7 Bank Reg. 71.

<sup>3</sup> McFarland v. Goodman, 13 Am. L. Reg. 701; Schiltz v. Schatz, 2 Bissel C. C. 248; Drentzer v. Bill et als., 11 Wis. 114; see qualification of this rule in Pike v. Miles, 23 Wis. 164; Beals v. Clark, 13 Gray 18.

<sup>4</sup> Ex parte Pardue, North Dist. of Ga., 2 West. Jurist 279.

**§ 491. Written waiver of exemption under State law.** Under Sec. 1, Art. II, of the constitution of Virginia, and the acts of the general assembly of June, 1870, a debtor may waive his homestead right in any written instrument. The words "I hereby waive the benefit of the homestead exemption as to this debt" added or incorporated in a promissory note by a bankrupt debtor, held a sufficient waiver under the foregoing section of the constitution and acts of assembly.

By the above section of the constitution it is provided "that every householder or head of a family shall be entitled to hold exempt from levy, etc., property to the value of not exceeding \$2,000, to be selected by him ; by section three it is further provided that nothing in the article should be construed to interfere with the sale of property exempted, or any portion thereof, by virtue of any mortgage, deed of trust, pledge, or other security thereon ; and section five, the general assembly should, at its first session under the constitution, prescribe in what manner and on what conditions the householder or head of family should thereafter set apart and hold for himself and family a homestead out of the property thereby exempted ; and might, in its discretion, determine in what manner and on what conditions he might thereafter hold, for the benefit of himself and family, such personal property as he might have, but that said section should not be construed as authorizing the general assembly to defeat or impair the benefits intended to be conferred by the provisions of this article." And section seventh, "the provisions of this article should be liberally construed to the end that all the interests thereof might be fully and properly carried out."

The Act of the assembly of June, 1870, in pursuance of the foregoing provision, provided that "in all cases where a debtor or contractor shall declare, in the body of the bond, note, or other evidence of the debt or contract, that he waives as to such debt or contract the exemption from liability of the property which he may be entitled to hold under the provisions of said act, the property, whether previously set apart or not, should then be liable to be subjected for such debt or contract under legal process."



On the 1st of May, 1873, one Solomon was adjudged a bankrupt; a firm who held the bankrupt's note, with the foregoing waiver inserted therein, made proof of their claim against the estate on the 24th of May. An assignee was appointed, who, on the 16th of February, 1874, set off to the bankrupt his homestead exemption under the laws of Virginia, without regard to the waiver expressed in the note. The holders of the note thereupon filed their petition in the District Court, praying to have said action of the assignee set aside, so far as it operated to prevent their subjecting the property set off to the payment of their debt in case the remainder of the bankrupt's estate should be insufficient for that purpose.

It was contended, on the part of the exemption claimant, that the said act of the assembly was unconstitutional, and contrary to the spirit and intent of the constitution.

Held, that said act was constitutional, and within the scope and power of the legislature as conferred by said clauses in the constitution, and that the waiver was sufficient.<sup>1</sup>

#### PRACTICE.

**§ 492. Rules and order governing assignee in bankruptcy.**—One of the general orders of the Supreme Court of the United States (under authority conferred by the tenth section of the bankrupt law) requires the assignee, (Gen. Or. 19) immediately on entering upon his duties, to prepare a complete inventory of all the property that comes to his possession, and to make a report to the Court within twenty days after receiving the deed of assignment of the articles set off to the bankrupt by him, according to the provisions of the fourteenth section of the act, with the estimated value of each article, and to allow to the creditors twenty days' time from the filing of such report in which to file exceptions to the determination of the assignee.

Under form number twenty, the schedule of property thus

<sup>1</sup> In re Solomon, U. S. C. C., E. D. Virginia, Am. L. Times Rep., June, 1874, Vol. 1, (N. S.) 351.



designated and set apart by the assignee to be retained by the bankrupt, to wit: necessary household furniture, other articles and necessities, wearing apparel of bankrupt and his family, equipments, if any, as a soldier, other property exempted by the laws of the United States, and finally, such property, real and personal, as is exempt by the State laws of his domicile.

**§ 493.** If creditors have any objections to make, on the ground that unauthorized exemptions have been allowed to the bankrupt by the assignee, they must file their exceptions to his report of such allotment, under general order 19, within the time prescribed, as respects household furniture and other necessary articles; but as to real estate, the attempted exemption is void; no title passes from the assignee, and creditors need not except to the report, but may to the account of the assignee.<sup>1</sup>

But, in some cases, it would appear that real estate may be set apart for the bankrupt, where it will not injure the sale of other real estate, or work adversely to the interests of the creditors.<sup>2</sup>

**§ 494.** Where property has been set apart by the assignee of a bankrupt, under his exemption claim, and no exceptions are taken to the action of the assignee, the property exempted passes to the bankrupt, freed from the jurisdiction of the bankrupt Court.<sup>3</sup>

**§ 495.** An error in a schedule, where an erroneous claim in such schedule is made, that certain articles therein mentioned are exempt from execution, though the affidavit to such schedule states, in the prescribed form, that it contains a statement of all the bankrupt's estate, is not material, its truth is not affected. If the bankrupt makes an erroneous claim, it is the duty of the assignee to correct it.<sup>4</sup>

<sup>1</sup> In re Gainey, 2 Bank Reg. 163; In re Jackson, 2 Bank Reg. 158.

<sup>2</sup> In re Edwards, 2 Bank Reg., N. S. 109, Jan., 1869, U. S. C. C., Virginia.

<sup>3</sup> In re Fetherston, 5 Chicago Legal News 193; also, In re Fetherston, 3 Pitts. Rep. 480 (20 Pitts. L. J. 77).

<sup>4</sup> In re Whitmore, Deady 585.

**§ 496.** A person who is entitled to a homestead reservation under the laws of the State where he resides, and where such property is situated, and which property a Court of chancery has ordered, in general terms, to be sold to satisfy a creditor whom he had attempted to defraud by a secret conveyance of it, must set up his right to it before the property is thus sold. He cannot set it up collaterally after the sale, and so defeat an ejectment brought by a purchaser to put him out of possession.<sup>1</sup>

**§ 497.** The bankrupt Court will not enjoin a judgment-creditor from selling the bankrupt's homestead under execution—the jurisdiction is in the State Courts.<sup>2</sup>

**§ 498.** The State exemption laws apply to process issued out of Federal Courts.<sup>3</sup>

**§ 499.** A married man may maintain ejectment to recover possession of the homestead during pendency of an application, on his part, to be discharged from his debts under the insolvent laws.<sup>4</sup>

#### PERSONALTY UNDER BANKRUPT LAW.

**§ 500.** Bankruptcy Courts will protect the rights of the bankrupt, and see that the property exempted, and to which the bankrupt is entitled, is secured to him, as well as to see that the bankrupt surrenders all his property, not exempt, to his creditors.<sup>5</sup>

**§ 501.** No authority resides in the Court to order an allowance to the bankrupt for the support of himself and family ; but the assignee may make a small allowance, not to

<sup>1</sup> *Miller v. Sherry*, 2 Wall. 238; *Johnson v. Bishop*, 1 Woolworth 324 (Justice Miller's Decisions).

<sup>2</sup> *In re Hunt*, 4 Chicago Leg. News 5.

<sup>3</sup> *Manufac. Bank of Wheeling v. Bayless*, 1 West. Law, Mo. 356; 1 Bright. Dig. 414.

<sup>4</sup> *Moore v. Morrow*, 28 Cal. 551.

<sup>5</sup> *In re Stevens*, 2 Biss. C. C. 373.

exceed in any event the amount expressed in the bankrupt law. A reasonable sum may be allowed the bankrupt for taking charge of the property.<sup>1</sup>

**§ 502. Rule in relation to \$500 exemption under bankrupt law.**—Some difference of opinion has arisen in relation to the interpretation to be given to that portion of Section fourteen of the bankrupt act which says, “that there shall be excepted” from the conveyance of all the property, real and personal, of the bankrupt, by the register to the assignee, “necessary household and kitchen furniture, and such other articles and necessaries of such bankrupt as the assignee shall designate and set apart, having reference in the amount to the family, condition, and circumstances of the bankrupt, but altogether not to exceed in value, in any case, the sum of five hundred dollars, and wearing apparel,” etc., whether the bankrupt is entitled to this amount of property, in any event, irrespective of the State exemption laws.

The rule seems, however, to be, that the same articles shall not be set aside for the use of the bankrupt under both State and United States exemption laws: that where “all the necessary household and kitchen furniture and other necessary articles,” etc., are set aside under the State laws to the full value of \$500 or over, there will be no further allowance, especially where all the articles enumerated are delivered over to the bankrupt for himself and family. The object of the exemption in the United States law seems to have been to supply, in any event, to the bankrupt, all the household necessities of life for his immediate use, and more especially to apply to those States, which are very few, where no adequate provision is made in their local laws for the protection of the family in case of disaster.

But “the amount of property exempted by the State laws is exclusive of the \$500 which may be set apart for the bankrupt under Act of 1867.”<sup>2</sup>

<sup>1</sup> *Ex parte Grant*, 2 Story C. C. 312.

<sup>2</sup> *Ex parte Cobb*, 1 Bank Reg. 106; *In re Ruth*, 7 Am. Law Reg. 157; *In re Hezekiah*, 11 Bank Reg. 573.

§ 503. All articles enumerated and exempt by State laws are exempt under the bankrupt law, irrespective of their value.—In the case of Irwin Davis,<sup>1</sup> where the question presented was, whether the necessary household and kitchen furniture to be set apart for the use of the bankrupt was confined to the value of \$500 under the bankrupt act, or whether there is excepted from the operation of the assignment all necessary household and kitchen furniture which by the law of the State is exempt from levy and sale on execution.

It was contended, on the one hand, that the bankrupt was entitled to retain all the property which, by the State law, is exempt from levy and sale on execution; and that as by the State law all necessary household and kitchen furniture, without limitation of value, is so exempted, he was entitled to have it set apart to him.

On the other hand, it was contended, in opposition to this view, that the fourteenth section of the act provides for the exemption of the household and kitchen furniture; “that it limits the value of the furniture so exempt to the sum of \$500; and that the subsequent clause which adopts the exemption laws of the State applied by its terms to ‘other property not included in the foregoing exceptions,’ *i. e.*, to property other than household and kitchen furniture, which is included in, and is the subject of, the exceptions referred to.”

It was held, that the bankrupt was “entitled to retain all his necessary household and kitchen furniture of the kind, and to the amount, exempted by the State law,” and that “all these exemptions are to be allowed irrespective of the value of the property.”

Hoffman, J., said: “The general policy and intent of the bankrupt law indicated by” its provisions, are obvious. “The exemptions allowed by State laws are recognized and adopted, and the bankrupt is required to surrender to the assignee, for equal distribution among his creditors, such property and effects only as are by the law of his domicile liable for his debts.”

The framers of the law appear to have thought that the

States were better able to determine each for itself what property of its citizens should be applicable by law to the payment of their debts, than Congress was to prescribe an invariable and universal rule. \* \* \* \* The construction of the act suggested by the bankrupt is, therefore, the only one which will give effect to its obvious intent, and at the same time do no violence to its language. The words 'other property not included in the foregoing exceptions,' may well be taken to mean property other than and not included among the articles set apart by the assignee under the first clause, and they will embrace all property, whether of the same or a different kind, which is by State law exempted from forced sales."

**§ 504. Articles to be set apart for the use of the bankrupt.**—In *Ruth's Case*,<sup>1</sup> where the bankrupt, in addition to the State exemption, claimed also the full sum of \$500, under the United States bankrupt law, Cadwalader, J., said: "The bankrupt law merely provides that the State exemption laws shall still apply, so far as to exclude their subjects from the operation of the proceedings in bankruptcy. The law further enacts, in effect, that there may in proper cases be an additional exemption, to be graduated with reference to the numbers, health, etc., of the members of the bankrupt's family, to his condition in life, social and otherwise, and to his former and recent, if not present circumstances. The allowance is conditional, and is measured with reference not merely to value, but also to subjects, and their suitableness to personal requirements. The subjects must be necessities and other articles which, in character as well as in amount, are suitable to his family, condition, and circumstances. The assignee should first consider what exemption is claimed under the State laws. These subjects of exemption, and the specially designated articles, having been set apart, the more responsible duty is afterwards to be performed by him in designating the additional articles exempted under the laws of Congress."

<sup>1</sup> 6 Phila. R. 438.

It is said in the case of *Ex parte Feely*,<sup>1</sup> that the assignee cannot set apart for the use of the bankrupt under the State laws, property specifically mentioned in the fourteenth section of the bankrupt act; that the allowance under the State law must be of a different kind of property.

**§ 505. Money may be allowed—**Where there are no articles which are necessities, to be set apart to the bankrupt, according to some authorities, money may be set apart by the assignee, but real estate cannot be so set apart in lieu thereof, even though the personal property, excluding the articles exempted by the State law, be less than the amount which the assignee thinks should be allowed the defendant.<sup>2</sup>

In the case of *Welch*,<sup>3</sup> the setting apart of money to the bankrupt by the assignee was said to be improper and unauthorized, unless such money is the proceeds of specific things which could and ought to be set apart under the head of "other articles and necessities" of the bankrupt.

In setting apart for the use of the bankrupt articles of exempt property, the assignee is not obliged to designate articles on which there is no lien,<sup>4</sup> and all such articles so set apart must be of a palpable and immediate necessity.<sup>5</sup>

**§ 506. What articles are, and what are not, exempt.—**A fowling-piece, pistol, fishing tackle, paintings, etc., are not necessities, and cannot be set apart as such,<sup>6</sup> nor is a pew in a church exempt, and therefore cannot be set apart under the head of necessities.<sup>7</sup>

A watch, not being exempt under the State statute, does not properly come within the articles designated under the bank-

<sup>1</sup> 15 Pitts. L. J. 291 (1 Bright. Dig. 88). See also, as to construction of the provisions of the third section, *In re Williams*, 5 Law Reporter 155; *Ex parte Noakes*, 1 Bank Reg. 164.

<sup>2</sup> *In re Thornton*, 2 Bank Reg. 68; *In re Thornton*, 8 Am. Law Reg. 42; *In re Hay*, 7 Bank Reg. 344.

<sup>3</sup> 5 Bank Reg. 348. Per contra, it can, 1 N. Y. Leg. Obs. 322.

<sup>4</sup> *In re Preston*, 6 Bank Reg. 545.

<sup>5</sup> *In re Laidlaw*, 1 Abb. N. Dig. 259.

<sup>6</sup> *In re Ludlow*, 1 N. Y. L. Obs. 322.

<sup>7</sup> *In re Comstock*, 1 N. Y. Leg. Obs. 326.

rupt law, but a family sewing machine is a necessary article within its meaning.<sup>1</sup>

**§ 507. A cemetery vault, where it is exempt by State law, does not pass to the assignee, and is therefore exempt.**

A bankrupt was possessed of one-half of a vault held by him by virtue of a certificate from the New York Marble Cemetery Company. By the second section of the statute, passed in 1842, incorporating the company, it is enacted "that the said cemetery shall and may at all times hereafter be used and appropriated for the interment of the dead, and for no other use or purpose whatever. The said vaults shall be deemed personal property, and shall not, in case where not more than one of them is owned by the same person, be liable to sale on execution, or be inventoried as assets applicable to the payment of debts."

Held, that the act of the State sanctioned the dedication of a corporate franchise to a pious use ; that the bankrupt's interest in the vault could not be reached by creditors, and therefore that it did not pass to the general assignees.<sup>2</sup>

**§ 508. An assignee in bankruptcy is not entitled to recover the proceeds of the sale of a personal right, disposed of within four months of such bankruptcy, of a member of a voluntary association, when the right of membership depends upon the assent of the member of such association, and where such member has only a qualified and limited right of property in such membership, which is subordinate to that of his associates, unless there be a surplus left after all claims due by such member to his associates are satisfied, and then only to the extent of such surplus.**

"Where, under the articles of association of a board of stock brokers, a member cannot transfer his seat to a party not elected and approved by the board ; and where, upon insolvency of a member, his rights as such are forfeited, and the board is authorized to dispose of his seat, and apply the proceeds to the payment of his indebtedness to other members of the board, to the exclusion of all others, only the residue

<sup>1</sup> In re Graham, 2 Biss. C. C. 449.      <sup>2</sup> Ex parte Ely, N. Y. Leg. Obs. 131.



of the proceeds of the sale, after paying all the liabilities provided for in said articles of association, is assets of such insolvent member."

"Under such articles, F, a member, failed to meet his engagements in the board August 24th, 1872, and being indebted in a large amount to sundry members, on that day assigned his seat in the board to W, with authority to sell and pay the proceeds to his various creditors in the board. With the assent of the board, W sold the seat to S, who was elected by the board, for ten thousand dollars, and with the approval of the board, paid the entire proceeds pro rata to F's creditors, who were co-members. October 1st, 1872, F was adjudged a bankrupt, on petition of a general creditor, filed Sept., 1872. After said sale and payment, an assignee having been appointed, he brought suit against W to recover said sum of ten thousand dollars."

Per Sawyer, Circuit J., held, that the assignee was only entitled to the residue after payment of F's liabilities to the co-members provided for in the articles of association, and there being no surplus, he was not entitled to recover.<sup>1</sup>

#### PROTECTION OF BANKRUPT PROPERTY BEYOND THE STATE.

**§ 509. Property exempt by the laws of the State where the bankrupt resides, and where the petition is filed, will be protected, wherever it may be actually situated.** Thus, where at the time of the filing of the petition in bankruptcy in Wisconsin, certain personal property was in the possession of an officer of the State of Illinois—where, by law, it was not exempt—by virtue of a writ of attachment, the Court said that it would not consider the laws of Illinois, to see whether, under them, the property (team of horses, harness and wagon) is exempt; the rights of the bankrupt and his creditors are to be determined under the bankrupt act alone. "Attachments are dissolved without reference to the property upon which they are levied, the object of the

<sup>1</sup> U. S. C. C. for California, Pacific Law Reporter, June 9th, 1874. Also to be found in Am. Law Times Rep., Vol. 1, 354, August, 1874.



act being to stop all proceedings against the bankrupt in any Court, and bring all matters and questions between the bankrupt and any other Court for final settlement.”<sup>1</sup>

**§ 510. Workman entitled to the proceeds of goods sold by assignee improperly.**—A merchant tailor, who is a practical workman, and who cut and fitted garments for customers, and superintended their manufacture, is entitled, as against the assignee in bankruptcy, to have exempt goods to the value of \$400, under the statute of Kansas in force in 1864. This is a fixed and determinate right, given by statute, and is not dependent upon the discretion of the assignee, and where it is claimed by the bankrupt, before the sale of the goods by the assignee, and illegally refused, it may be asserted against the proceeds of the goods while in the hands of the Court for distribution.<sup>2</sup>

**§ 511. Merchants not entitled to the rights of mechanics, miners, etc.**—But, under the same local statute, a merchant, doing business and residing in Kansas, is not entitled to the special exemption allowed mechanics, miners, or other persons, for the purpose of carrying on their trade or business.<sup>3</sup>

**§ 512. The “business of a contractor” is not a “trade, occupation, or profession”** within the meaning of the act (Or. Code, 211) exempting certain tools and implements from execution.<sup>4</sup>

**§ 513. Property acquired by bankrupt after proceedings commenced does not vest in assignee.**—Under the fourteenth section of the bankrupt act, “property and rights acquired by the bankrupt after the commencement of the proceedings in bankruptcy do not vest in the assignee.”

Where a wife, possessed of separate estate secured to her by ante-nuptial settlement, obtained in 1869 a policy of in-

<sup>1</sup> In re Stevens, 2 Biss. 373.

<sup>2</sup> Ex parte Jones, 6 West. Jurist 71 ; also in 4 Chicago L. News 66.

<sup>3</sup> In re Schwartz, 4 Bank Reg. 189.

<sup>4</sup> In re Whitmore, Deady C. C. 585 Oregon.

surance upon her life, payable upon her death to her husband, the premium for a year was paid by her out of her own estate. Before the year expired her husband was adjudged a bankrupt. Out of her own estate she paid the premiums for the two following years, 1870 and 1871, and before the next premium fell due she died. The question arose between the husband and the assignee in bankruptcy, which of the two was entitled to the proceeds of the policy.

Held, that considering the nature of the contract of insurance, and the obvious intention of the wife, that the assignee had no right to the proceeds, but that they belonged to the husband. "Under the circumstances of this case, the creditors for whose benefit the money is sought, have not the shadow of a shade of equity to it, nor to defeat the provident and just provision which the wife intended to secure for her husband, not for them."<sup>1</sup>

**§ 514.** So, in Pennsylvania, a vested expectant interest of a bankrupt in a sum of money payable at his own death, or at the death of another person, may be set apart for the use of bankrupt, providing it does not exceed the amount exempt by law.<sup>2</sup>

**§ 515. Exemption of individual partners out of partnership assets.**—Quite a diversity of opinion at one time existed, and still exists to some extent, among the several District Courts, whether, under the 14th section of the bankrupt act, individual partners are entitled to the exemptions therein named out of the partnership assets, where there are no individual assets, and where the partnership assets are insufficient to pay the partnership liabilities.

Thus, in *Ex parte Price*<sup>3</sup> it was held, that an exemption in accordance with the foregoing section could not be allowed to an individual partner out of the partnership estate, on the ground that such exemption could only be allowed in cases where there is a surplus after paying the partnership creditors.

<sup>1</sup> In re Murrin, 2 Dill. 125.

<sup>2</sup> Ex parte Bennett, 6 Phila. 472.

<sup>3</sup> 6 Bank. Reg. 400.

But in the case of *Ex parte Young*,<sup>1</sup> where the assignee had allowed the two members of a bankrupt firm an exemption of \$150 each, out of the partnership assets, there being no individual assets, the register disallowed the same. On the facts being certified to the Court for its opinion, it was held, that the bankrupts were entitled to the exemption out of partnership assets.

Again, in the case of *Ex parte Rupp*,<sup>2</sup> it was held that joint assets were liable to the provisions of the bankrupt act allowing exemptions, where there are not sufficient individual assets.

The subject has recently received, at the hands of Treat, J., an elaborate review, in a case which arose in the E. D. of Missouri, in an opinion filed Nov. 9th, 1874, in which one S. H. Richardson petitions for exemption to be allowed out of partnership assets. Treat, J., said, in speaking of the bankrupt act: "That act has, at least, this twofold object: *First*, to enable all the creditors to share equally in his assets, and, *Second*, while discharging him, being honest and unfortunate, from the further obligations of his debts, to leave him some provision for himself and family until he can start anew in life." The liberal view to be taken of that act is illustrated in the case of *Cox v. Wilder*,<sup>3</sup> in which the United States Circuit Court overruled this Court, even in the case of a fraudulent conveyance. If, despite such a conveyance by husband and wife, they are, on its being set aside as fraudulent against creditors, re-invested in their homestead and dower rights, why not, a fortiori, the needed or prescribed exemption in the absence of fraud, out of any assets in which the debtor was interested. But it is urged that the individual interest of a partner, in copartnership assets, is only in the surplus after copartnership debts are paid; but is not the question in a fraudulent conveyance, that is, fraudulent as to creditors, estopped from assailing the grant?" If his creditors can set it aside for their own benefit, although it was valid as between the parties thereto, and the ground on which they can thus do so is, that they have an interest in their debtor's property, entitling them to subject it to the payment

<sup>1</sup> 3 Bank. Reg. 111.

<sup>2</sup> 4 Bank. Reg. 25.

<sup>3</sup> 2 Dillon 45.

of their demands, and, notwithstanding their rights and the acts of the grantor, he, when the creditors have divested the grantee, is remitted to his original position as to homestead and other exemptions in said property, why should not said debtor, despite his creditors' interest in copartnership assets, or the interest of copartnership creditors therein, still retain, out of the copartnership assets, the amount of exemption interests for the benefit of himself and family? If his individual estate is large enough to furnish the required exemptions, it should be alone subject thereto, just as his individual debts are primarily chargeable to his private estate. His individual creditors, if there is a surplus in the copartnership estate, receive the benefit thereof, if the private estate is deficient, and vice versa. The copartnership creditors, if not paid out of the copartnership fund, have the benefit of the private estate, if not exhausted in individual debts. Hence, the technical rules as to the relationship of copartnership and individual creditors with respect to copartnership and private estates, if properly applied to exemptions, would remit the debtor to his private estate primarily, and if that were insufficient, then to the copartnership estate. So far is the principle underlying the rule from defeating the humane doctrine contended for, that logically it requires that doctrine to be asserted."

"The exemptions are for the 'debtor's benefit,' and apply to all his property, irrespective of the fact that creditors or others may have an interest therein. As among classes of creditors, individual and copartnership, they are permitted, as among themselves, to proceed against the one or the other fund, respectively, and against both in certain contingencies; why, therefore, is not the debtor, under like contingencies, entitled to the same benefit?"

"There is nothing in the State statutes, or in the bankrupt act, to the contrary; and if we observe the scope and object, instead of narrowing the question to mere technical terms, we give due force to wise and humane provisions of the law."

"The exemption claimed must be allowed."<sup>1</sup>

<sup>1</sup> In re S. H. Richardson & Co., Chicago L. News, p. 62, November 14, 1874; also, in 11 Bank Reg. 114.

**§ 516. Right of disposition of exempt property by the bankrupt.**—The rule in relation to the disposition of exempt real property by the bankrupt, by way of conveyance, mortgage, or otherwise, (Ante, Sec. 489) applies to personal property as well, and a bankrupt can lawfully dispose of such personal property.

The assignee is not in a position, in relation to exempt personal property, to sue and recover such property so conveyed. Where the creditors would have no right to seize and sell the property, the assignee, their representative, has no greater rights.

Thus, where a bankrupt was a brewer, and becoming embarrassed, mortgaged two horses as security for a debt previously contracted, it appearing that these were the only horses owned by the bankrupt at the date of the mortgage, and up to the time of the filing the petition in bankruptcy. When the mortgagee received the horses and the chattel mortgage, he had reasonable cause to believe the bankrupt insolvent. The mortgagee took possession of the horses only a few days before the petition in bankruptcy was filed. The bankrupt and his family left the country immediately after giving the chattel mortgage, and was not known to be in the State. Held, that the horses under the circumstances, being exempt under the laws of Wisconsin, where they were, and where the bankrupt had his domicile, the assignee could not recover the horses from the mortgagee, and had no right of action.

The Court said: "If the bankrupt had not made the mortgage, and he had remained in his domicile, the assignee in bankruptcy would not be entitled to claim the horses. The fact of abandonment of his domicile by the bankrupt after the mortgage of the horses to the mortgagee, and the possession under the mortgage before the commencement of proceedings in bankruptcy, cannot place the assignee in any better attitude. The bankrupt had a lawful right to mortgage or sell the horses, and having disposed of them, under the law of the State his creditors could not take them by legal process, for debt from the mortgagee; neither can the as-

signee in bankruptcy recover of the mortgagee the proceeds of the sale." <sup>1</sup>

The question seems to be resolved into this: articles exempt under State law, which are sold or disposed of, if they can be recovered under the State law as in fraud of creditors, then the assignee can recover. If not, the assignee has no standing in Court. The State law and the State interpretation of such law is the rule, and governs in bankruptcy proceedings.

**§ 517. But otherwise as to a bankrupt who sells his property in order to defraud his creditors, and takes notes in return, and executes a bill of sale of the same. Such sale being good as between buyer and seller, the vendor is not entitled to the exemption of such articles, he having parted with his title, although the sale be void as against creditors and the vendee took no title as against them.**

Thus, where a bankrupt sold all his stock in trade and tools as a harness-maker, three horses and three buggies, and a lot of cattle, and other property, at the price of \$3,684, and took notes for the amount, and a detailed bill of sale of the articles was given by him to the vendee: it was held, under the circumstances of this case, that the bankrupt was not entitled to the exemption, on the ground that he had parted with the title to the property before the filing of the petition, therefore had no interest in the things as between him and the purchaser. But being a fraudulent sale, the purchaser could not hold them as against creditors. <sup>2</sup>

<sup>1</sup> Schiltz v. Schatz, 2 Biss. C. C. 248.

<sup>2</sup> In re Graham, 2 Bissell C. C. 449; Smith v. Kehr, 2 Dill. C. C. 63.

## CHAPTER XIV.

### PERSONAL PROPERTY EXEMPTIONS.

**§ 518. Rules in construing statute exempting personalty same as realty.**—In the construction of statutes exempting personal property from attachment, distress, levy, and sale on execution, the same rules apply generally as those governing the homestead exemption, which has been treated in Chap. III, Secs. 51 to 67, therefore we will not enter into any elaborate review in the present part of the work.

**§ 519. Liberal interpretation of exemption laws.**—The personal exemption being for the benefit of the family of the debtor as well as for himself, the statutes receive a liberal interpretation.<sup>1</sup>

**§ 520. What is meant by "heads of families."**—Where the statute extends such exemption to the "head of the family," it will not be construed to mean only a man who has a wife and children living with him, but the term will be interpreted to embrace every one who controls, supervises, and manages the affairs of the house, though he have neither wife or child.<sup>2</sup>

<sup>1</sup> *Montague v. Richardson*, 24 Conn. 338 ; *King v. Moore*, 10 Mich. 538 ; *Ford v. Johns*, 34 Barb. 364 ; *King v. Moore*, 10 Mich. 538 ; *Megehe v. Draper*, 21 Mo. 510 ; *Becker v. Becker*, 47 Barb. 497 ; *Wade v. Jones*, 20 Mo. 75 ; *Stewart v. Brown*, 37 N. Y. 350 ; *State v. Romer*, 44 Mo. 101 ; *Alvord v. Lent*, 23 Mich. 369 ; *Robinson's Case*, 3 Abb. Pr. (O. S.) 466 ; *Eastman v. Caswell*, 8 Howard Pr. 75 ; *Carpenter v. Herrington*, 25 Wendell 370 ; *Buxton v. Dearborn*, 46 N. H. 44 ; *Deere v. Chapman*, 25 Ill. 610 ; *Franklin v. Coffee*, 18 Texas 413 ; *Wassell v. Tunnah*, 25 Ark. 101 ; *Hawthorne v. Smith*, 3 Nev. 182 ; *Hall v. Penny*, 11 Wendell 44 ; *Griffin v. Sutherland*, 14 Barb. 456 ; *Gilman v. Williams*, 7 Wis. 329 ; *Bevan v. Hayden*, 13 Iowa 122.

<sup>2</sup> *Wade v. Jones*, 20 Mo. 75 ; *Lallu v. Waters*, 17 Ala. 482.

**§ 521. Husband or father will not be permitted to defeat the exemption, nor will the exemption allowed for the use of the family be permitted to be defeated by the action of the husband or father, in turning out the property to be levied upon in those States such as Michigan, where the wife is empowered to take such action as will secure for herself and family the personal exemption allowed by law.<sup>1</sup>**

**§ 522. The term "necessary" means all that is necessary to live in a convenient manner.—**So the term "necessary" in a statute which exempted from warrant or execution "bedding and household furniture necessary for supporting life," was held, while it excluded superfluities and articles of luxury, not to denote those articles of furniture only which are indispensable to the bare subsistence of the debtor and his family, but to embrace those things which are requisite in order to enable the debtor and his family to live in a convenient and comfortable manner.<sup>2</sup> Thus, where a debtor had in use for himself and family, chairs and tables, etc., of a superior quality, the law would not allow such superior articles to be disposed of and replaced with an inferior quality of much less value, which he and they had not been accustomed to use.<sup>3</sup> And it was even said that "the meaning was not to be confined to such articles as were considered necessary when the act was passed."<sup>4</sup>

**§ 523. Work-cart does not include pleasure carriage.** But the term one "horse or ox-cart," under a statute exempting such from execution, for the ordinary purposes of husbandry, does not extend or apply to a pleasure carriage, nor to those larger wagons drawn by horses, and employed solely in the carrying trade; but such carts or wagons only as are suitable to be employed about the domestic establishment.<sup>5</sup>

<sup>1</sup> King v. Moore, 10 Mich. 538.

<sup>2</sup> Haswell v. Parsons, 15 Cal. 266.

<sup>3</sup> Deckerman v. Van Tyne, 1 Sandford 724.

<sup>4</sup> Montague v. Richardson, 24. Conn. 338.

<sup>5</sup> Favers v. Glass, 22 Ala. 621.



**§ 524. Exempt property continues to be exempt after death of householder.**—Where such property is exempt from seizure and sale during the lifetime of the judgment debtor, it will be protected after his death for the benefit of the widow and children, as such laws were enacted for their benefit as well as for the debtor's.<sup>1</sup>

**§ 525. The interpretation is to be according to what is written.**—Yet, while the Courts extend to these exemption statutes a liberal interpretation, it is said in the case of *Rue v. Allen*,<sup>2</sup> that “the statutes exempting a debtor's property from the payment of his debts are not remedial in the ordinary sense so as to require them to be construed with any peculiar liberality. They are in derogation of the common law, and confer immunities and privileges contrary to its general maxims. The interpretation, therefore, is to be according to what is written, or that which is plainly or manifestly to be implied from what is written.”

**§ 526. Exemptions derive their force from statute law of State.**—The exemption of property from attachment, levy, distress, seizure, and sale, of course derives its force from the statute law of the State ; as under the common law there was little or no exemption of property from the process issuing from the Courts.

**§ 527. The rule at common law, early adopted,** in relation to exemption, extended only to articles and things in actual use, such as a hat on a man's head, or a horse which he is riding. Such articles and things, while so in actual use, could not be taken away or distrained under the law of distress, which is analagous to our law of attachment.<sup>3</sup> So, also, whatever cannot be restored in the same “plight” is exempted from distress, and this rule was applied to attachments by the Massachusetts Courts prior to the exemption laws of that

<sup>1</sup> *Becker v. Becker*, 47 Barb. 497 ; *Bonnell v. Dunn*, 5 Dutch 435.

<sup>2</sup> 5 Denio 119.

<sup>3</sup> Co. Lit. 47*a*, Harg's Notes ; 3 Blk. Com. 280 ; *Simpson v. Hartop*, Willes 513 ; *Story v. Robinson*, 6 T. R. 139 ; *Garbor v. Faulkner*, 4 T. R. 565 ; *Hutching v. Chambers*, 1 Burr. 579.

State.<sup>1</sup> The reason assigned for this rule in the early cases is, that to allow distress under such circumstances would lead to perpetual breaches of the peace ; and it is required on the ground of public policy and the convenience of trade ; as a horse standing in a smith's shop to be shod ; cloth at a tailor's shop ; a horse which has carried articles to market, and is standing in the market, etc.<sup>2</sup>

The rule laid down in Hargrave's Note, Co. Lit., 47*a*, that a chattel cannot be taken away or distrained, "although it be valuable property, as a horse when a man or woman is riding on him, or an ax in a man's hand cutting wood, and the like, they are for that time privileged and cannot be distrained." So, "if nets are in the hands of a man, they cannot be distrained any more than a horse on which a man is." <sup>3</sup>

After the leading case of *Simpson v. Haslop*<sup>4</sup> it became the unquestioned rule of law that those things which are in actual use cannot be taken or distrained. So, in the case of *Simbolf v. Alford*,<sup>5</sup> it is held that goods in the actual possession and use of the debtor cannot be distrained. "A man's clothes cannot be taken off his back in execution of a *fieri facias*."

**§ 528. Common-law rule adopted in the United States.** The same principle was affirmed in this country, that property in the manual possession of a debtor, or worn on the person, could not be taken by mesne process. The sheriff was held liable for trespass in attaching the plaintiff's watch while on his person, and carrying it away.<sup>6</sup>

**§ 529. The territorial limits of the exemption law.—** The exemption law secures the articles exempted from levy and sale for the use of the family, everywhere within the limits of the State. It is immaterial in what county the ex-

<sup>1</sup> *Bond v. Ward*, 7 Mass. 128 ; *Martindale v. Whitehead*, 1 Jones L. (N. C.) 64.

<sup>2</sup> *Read v. Burley*, Croke Elizabeth 596.

<sup>3</sup> Hargrave's Note, 294 ; *Read v. Burley*, Croke Eliz., 539, 596.

<sup>4</sup> 4 T. R. 568.

<sup>5</sup> M. & W. 253 ; *Adams v. Field*, 12 Ad. & El. 649.

<sup>6</sup> *Mack v. Parks*, 8 Gray 517 ; *Green v. Palmer*, 15 Cal. 411 ; *Frazier v. Barnum*, 19 N. J. Eq. 316 ; *Bumpus v. Maynard*, 38 Barb. (N. Y.) 626.

emption is claimed, the immunity from seizure and sale attaches to the property in the possession of the family wherever it may be, whether stationary or in the act of moving from one place to another, or whether such removal be made openly or clandestinely. The intention of the head of the family to abscond to avoid the payment of his debts cannot affect the right of the family to property which the law exempts from levy and sale for the payment of debts.<sup>1</sup>

**§ 530. Protection of the law applies only where family is in the State.**—But while the statute protects the property for the benefit of the family within the State, it will not apply to one whose family is without the State.<sup>2</sup> •

**§ 531. All heads of families within its protection.**—The privileges of the exemption law extend to all persons within the State, being heads of families, and no discrimination is usually made between permanent residents, sojourners, or strangers. The law exempts certain articles, or a certain amount in value, of the debtor and his family.<sup>3</sup>

**§ 532. What constitutes a family.**—A family may consist of two or more persons : thus, a man and his wife, though they have no children, are a family in the sense of the exemption law. So, a man and his daughter living together, the wife and mother being dead, are a family.<sup>4</sup> But a grown-up man, who lives with his stepmother, she having a family, is neither a householder nor a member of the family with which he resides. A householder means the head or person who has the charge of and provides for a family, and so long as that family remains together, without being broken up and incorporated into other families, the exemption privilege remains. The character of householder, or head of family, will not be lost by a mere temporary absence, though he

<sup>1</sup> *Davis v. Allen*, 11 Ala. 164 ; *Marks v. The State ex rel Bowles*, 15 Ind. 98 ; *Norman v. Belleman*, 16 Ind. 156.

<sup>2</sup> *Allen v. Manasse*, 4 Ala. 554.

<sup>3</sup> *Lowe v. Stringham*, 14 Wis. 222 ; *Abercrombie v. Alderson*, 9 Ala. 981.

<sup>4</sup> *Cox v. Stafford*, 14 How. Prac. 519 ; *Sallie v. Waters*, 17 Ala. 482 ; *Keiffer v. Barney*, 31 Ala. 192.

cease to keep house, goes with his family on a visit, stores his furniture with the intention of returning, the exemption still remains.<sup>1</sup>

In Pennsylvania, it has been held, that a bachelor debtor may have the benefit of the exemption law, though it is generally spoken of as intended for the benefit of the family. A bachelor may be a householder and head of a family, and as such is entitled to the exemption.<sup>2</sup>

A widowed daughter, the mother of several children, residing with her father, all using the home in common, she cultivating portions of the land with her children, is entitled to the exemption allowed the cultivators of the soil, and head of a family.<sup>3</sup>

**§ 533. Point of time the family relation commences as affecting the right of exemption.**—The marriage of the judgment-debtor, after judgment and before the levy under the execution, entitles such debtor to the exemption of the articles enumerated in the law for the use of families; on the ground, it is said, that the marriage of the debtor, before the levy of the execution, creates a lien in favor of the family paramount to the general lien of the plaintiff in execution.<sup>4</sup>

**§ 534. In Nebraska,** any resident of the State is entitled to the homestead exemption, even though his family are not within its limits, providing he takes up his residence with the intention of making it his home, and bringing his family to join him.<sup>5</sup> So, in Texas, the act exempting certain property from execution is not confined to any particular class of persons, but applies to all persons within the State.<sup>6</sup>

**§ 535. This right of exemption is a purely personal privilege,** of which the debtor alone, or his family, can take advantage. It is not assignable; nor can the debtor waive

<sup>1</sup> Griffin v. Sutherland, 14 Barb. 456; Wade v. Jones. 20 Mo. 75.

<sup>2</sup> Dieffenderfer v. Fisher, 2 Grant's Cases 30.

<sup>3</sup> Pollard v. Thomason, 5 Humph. (Tenn.) 56; Brigham v. Bush, 33 Barb. 596.

<sup>4</sup> Watson v. Simpson, 5 Ala. 233.

<sup>5</sup> The People ex rel. Dobson v. McClay, 2 Neb. 7.

<sup>6</sup> Cobbs v. Coleman, 14 Texas 594.

the right in favor of a subsequent creditor (unless such waiver was contemporaneous with the making of the contract); nor will it be exempt in the hands of a bailee or agent, at least to the extent of enabling the latter to maintain trespass against the sheriff for taking the property in execution. No one else, however he may claim under the debtor, can set it up to hinder the creditor.<sup>1</sup>

**§ 536. Claim and notice.**—In order to secure the exemption, in many of the States, it is requisite that the debtor give notice of his intention to claim such exemption to the officer who makes the levy. When the exemption law points out a particular mode in which the benefits of the law are to be claimed, the requirements of the act must be strictly complied with, if the debtor would avail himself of its protection.<sup>2</sup>

“The statute allowing exemption is reasonable and beneficent, and ought not to be so construed as to defeat the intention of the legislature, unless unavoidable.”

“Though a debtor is entitled to the statutory exemption of \$300 as against the process called attachment execution, he is to obtain it as in other cases by demanding it of the officer when the process is served, or within a reasonable time after. The reason why he is held to promptitude of demand is that the costs of further proceedings may be saved. If he fail to make a demand, a subsequent plea of his right will not avail him.”<sup>3</sup>

<sup>1</sup> *Borland v. O'Neil*, 22 Cal. 505; *Hill v. Johnston*, 29 Penn. St. 361; *Bowman v. Smily*, 31 Penn. St. 225; *Mickes v. Tousley*, 1 Cow. 114; *Earl v. Camp*, 16 Wend. 562; *Smith v. Hill*, 22 Barb. 656; *Yeager v. Nicholls*, 7 Phila. R. 91; *Wilson v. McElroy*, see 32 Penn. St. 82; *McAfoose's Appeal*, 32 Penn. St. 277; *Eberhart's Appeal*, 39 Penn. St. 509, and cases cited in note 1; *Line's Appeal*, 2 Grant's Cases 197; *Dodson's Appeal*, 25 Penn. St. 232.

<sup>2</sup> *Collins v. Boyd*, 56 Penn. St. (6 P. Smith) 402; *Sennickson v. Fulton*, 1 Phila. 220; *Gavitt v. Doub*, 23 Cal. 79; *Gresham v. Walker*, 10 Ala. 370.

<sup>3</sup> *Stroure's Ex. v. Becker*, 44 Penn. St. (8 Wright) 206; *Bair v. Steinman*, 52 Penn. St. (2 P. Smith) 423; *Borland v. O'Neil*, 22 Cal. 505; *Slate v. Floyd*, 11 Iridells 496; *Haven v. Melogue*, 9 Ind. 196; *Opitz v. Winn*, 3 Or. 9; *White v. Thompson*, 3 Or. 115; *Gresham v. Walker*, 10 Ala. 370; *Simpson v. Simpson*, 30 Ala. 225; *Watson v. Simpson*, 5 Ala. 233.

**§ 537. No claim necessary in some States, where within the statutory allowance.**—Where the property claimed as exempt does not exceed the amount allowed by statute, no formal claim or demand is necessary by the claimant, for the statute by its own force sets apart the whole property to the use of the debtor. By the law itself it is placed beyond the law: the officer seizes and sells at his peril, the same as when specific articles are exempt.<sup>1</sup>

But where the property seized exceeds the amount exempt by law, it is necessary that demand be made for the exemption, and an appraisement (when the particular statutes require such) had. The benefits of the law cannot be lost except by the omission of the party entitled to make his or her claim in due time and in the proper manner, or by some act inconsistent with a bona fide claim.<sup>2</sup>

**§ 538. A claim for exemption under an attachment must be made, not only prior to the hearing, but before the day of hearing.** Thus, where a defendant made his claim on the same day as the hearing and shortly before trial, it was held to be practically a claim at the hearing, and therefore too late.<sup>3</sup>

“The statute was not made to hinder or harass creditors, but to save honest debtors who demand an appraisement in time of \$300 worth of their estate. If, however, they see their property levied upon and advertised without claiming the statutory boon, they elect to waive it, and the sheriff or constable may disregard a demand coming so late as half an

<sup>1</sup> Gilleland v. Rhoades, 34 Penn. St. 187; Rogers v. Waterman, 25 Penn. St. 182; Diehl v. Holben, 39 Penn. St. 213; Keller v. Bricker, 64 Penn. St. 379; Frost v. Shaw, 3 Ohio St. 270; Wilson v. McElroy, 32 Penn. St. 83; Stevens v. Becker, 44 Penn. St. 206; Cole v. Green, 21 Ill. 104; Hammer v. Freese, 19 Penn. St. 255; Campbell v. Gould, 17 Ind. 133.

<sup>2</sup> Hill v. Johnston, 29 Penn. St. 362; McAfoose's Appeal, 32 Penn. St. 277; Bowman v. Smiley, 31 Penn. St. 225; Eberhardt's Appeal, 39 Penn. St. 509; Fuller v. Sparks, 39 Texas 136.

<sup>3</sup> Collins v. Nichols, 5 Ind. 447; State ex rel. Biddinger v. Manly, 15 Ind. 8; Zimmerman v. Briner, 50 Penn. St. (14 Wright) 535; Cooper v. Reeves, 13 Ind. 53; Rushworth v. Swope, 1 Leg. Gaz. (Penn.) 223; Bancord v. Parker, 65 Penn. St. (15 P. Smith) 336.

hour before the sale."<sup>1</sup> The omission of a debtor to give notice, before the sale, of his claim to property of the statutory value under the law, will be a bar to his claim to receive the statutory amount of the exemption out of the proceeds of the sale.<sup>2</sup>

So, a demand of an appraisement by the defendant in an execution, after the property levied upon has been set up for sale and the biddings begun, is too late.<sup>3</sup>

**§ 539. Demand must be made on each execution.**—And, to avail himself of the exemption law, a defendant must make the demand on each particular execution. A demand on one execution will not apply to a subsequent writ on a different judgment.<sup>4</sup> Where such demand is made, and the sheriff, disregarding such claim, proceeds to sell, the defendant may, on leave obtained, be permitted to take out of Court the amount of the exemption allowed by law from the proceeds of the execution, without being compelled to resort to an action against the sheriff, or other officers in charge of the process, to recover the amount exempt.<sup>5</sup> But a second demand is not necessary when execution issues, and a sale thereunder is set aside after demand made, and an alias execution issues subsequently.<sup>6</sup>

**§ 540. Time allowed in which to claim exemption.**—Lapse of time is not necessarily material, but will become so when it arises from want of due diligence on one side, and

<sup>1</sup> *Simpson v. Simpson*, 30 Ala. 225; *Borland v. O'Neile*, 22 Cal. 505; *Duffenderfer v. Fisher*, 3 Grant's Cases 30.

<sup>2</sup> *Miller's Appeal*, 16 Penn. St. 300; *Hammer v. Freese*, 19 Penn. St. 257; *Weaver's Appeal*, 18 Penn. St. 307; *Rogers v. Waterman*, 25 Penn. St. 184; *Brant's Appeal*, 20 Penn. St. 141; *Bowyer's Appeal*, 21 Penn. St. 210; *Dodson's Appeal*, 25 Penn. St. 233; *McGee v. Anderson*, 1 B. Monroe 265; at any time before sale.

<sup>3</sup> *Rogers v. Waterman*, 25 Penn. St. 182; *Hammer v. Freese*, 19 Penn. St. 255.

<sup>4</sup> *Dodson's Appeal*, 25 Penn. St. 232; *Line's Appeal*, 2 Grant's Cases 197; *Bechtell's Appeal*, 2 Grant's Cases 375; *Haswell v. Parsons*, 15 Cal. 266; *Johnson & Sutton's Appeal*, 25 Penn. St. 117, differs from *Byrnes' Appeal*, 21 Penn. St. 210, in the fact that in the former the debtor's claim for exemption was made in time, therefore the waiver as to that particular creditor was good.

<sup>5</sup> *Hammer v. Freese*, 19 Penn. St. 257; S. C., 5 Penn. L. J. R. 153.

<sup>6</sup> *McAflouse's Appeal*, 32 Penn. St. 276; *Cook v. Baine*, 37 Ala. 350.



results in loss on the other. Thus, it was held, that a claim made four days before the sale, in the absence of proof that defendant had earlier notice of the levy, was not too late.<sup>1</sup> A reasonable time will be allowed the exemption claimant in which to make his selection. Thus, in Pennsylvania, where part of the goods levied upon had been set apart to defendant on a former writ, he wanted to consult counsel as to the legal effect of that selection, under the second writ. The sheriff insisted on an immediate election. The Court held that the delay asked by the defendant was not unreasonable, and should have been granted.<sup>2</sup> So, the absence of the defendant in execution from his home will be sufficient excuse for delay in demanding the exemption, and especially where the claim of exemption was made on a previous seizure by the same parties.<sup>3</sup>

#### WHO MAY MAKE THE CLAIM.

**§ 541.** The claim of exemption may be made by any person authorized to take charge, or in charge of property, or any member of the family during the temporary absence of the owner, in case of a levy.<sup>4</sup>

Or in the absence of the father and husband, or other head of family, who has left the State, leaving his wife and children living together, the exemption remains, and may be claimed by them.<sup>5</sup>

**§ 542.** Waiver of the right.—The question of waiver of exemption laws has been differently decided in different States. In Pennsylvania, the Courts hold that such waiver is

<sup>1</sup> *Kee v. Hobensick*, 2 Phila. 28; *Seaman v. Luce*, 23 Barb. 240; *Frost v. Shaw*, 3 Ohio St. 270; *Lockwood v. Younglove*, 27 Barb. 505.

<sup>2</sup> *Elliott v. Flanigan*, 37 Penn. St. 425.

<sup>3</sup> *Haswell v. Parsons*, 15 Cal. 266.

<sup>4</sup> *Wilson v. McElroy*, 32 Penn. St. 82; *McCarthy's Appeal*, 68 Penn. St. 217; *Waugh v. Burkett*, 3 Grant's Cases 319.

<sup>5</sup> *Woodward v. Murray*, 18 Johns. 400.



effectual and will be enforced.<sup>1</sup> The right of waiver seems not to have been questioned by the Courts of Pennsylvania, from the passage of the act in 1849 till 1865, when the Court said, in the case of *Forreston v. Mack*,<sup>2</sup> in speaking of the waiver of the exemption: "If it were *res integra*; if with the experience and observation we have had, we were now, for the first time, to pass upon the question whether debtors could waive their rights under the Act of 1849, or widows theirs under the Act of 1851, we would be very likely to deny it altogether and stick to the statutes as they are written." A very full discussion of the question will be found in the cases here noted.

It is held, in Pennsylvania, that the debtor's privilege may be waived, either expressly or by implication, and that he does waive it when he fails to request an appraisement in due season, and request it under the execution by which the levy is made.<sup>3</sup>

In a majority of the States it is held that such waiver is ineffectual, and will not be enforced.<sup>4</sup>

In Pennsylvania, it is said that the statutory privilege of exemption of a portion of his property from levy and sale under execution, is one which may be waived by the debtor, "when made at the time the debt is created, the waiver is based upon the same consideration as that upon which rests the liability to pay, and is therefore irrevocable. Such a waiver is a contract, that, so far as regards the judgment creditor, in whose favor it is made, the debt shall be collecti-

<sup>1</sup> *McKenney v. Reader*, 6 Watts. 34; *Case v. Dunmore*, 23 Penn. St. 93; *Hauck's Appeal*, 24 Penn. St. 426; *Johnson v. Sutton's Appeal*, 25 Penn. St. 116; *Line's Appeal*, 2 Grant's Cases 197; *Shelley's Appeal*, 36 Penn. St. 373; *Bowman v. Smiley*, 31 Penn. St. 225; *Smith's Appeal*, 23 Penn. St. 310; see, also, *State ex rel. Melogue*, 9 Ind. 196; and as limiting this last case, *Eltzroth v. Webster*, 15 Ind. 21.

<sup>2</sup> 49 Penn. St. (13 Wright) 387.

<sup>3</sup> *Line's Appeal*, 2 Grant's Cases 197; *Dodson's Appeal*, 25 Penn. St. 232.

<sup>4</sup> *Haswell v. Parsons*, 15 Cal. 266; *Kneettle v. Newcomb*, 22 N. Y. 249; *Crawford v. Lockwood*, 9 How. Prac. R. 547; *Harper v. Leal*, 10 How. Prac. R. 282; *Sevicks v. Walker*, 9 Am. Law Reg. (La.) 112, 1860-61; *Shoenberger v. Watts*, 1 Am. Law Reg. (N. S.) 553; *Troutman v. Gowing*, 16 Iowa 415; *Curtis v. O'Brien*, 20 Iowa 376; *Warmbold v. Schlichting*, 16 Iowa 243; *Maxwell v. Reed*, 7 Wis. 582. See *Hewes v. Parkman*, 20 Pick. 90; *Denny v. White*, 2 Cold. (Tenn.) 283.

ble in the same manner as if the Act of 1849 had never been passed.”<sup>1</sup> Any construction of the law which would forbid the debtor to waive the exemption would be an unnecessary and unwarrantable abridgment of the right of dominion over property of the owner.<sup>2</sup>

But when there is no waiver of exemption in the judgment under which property is sold, the debtor can claim the statutory exemption of the proceeds, even though there be a waiver of the exemption in other judgments against him.<sup>3</sup> The holder of the judgment containing no waiver can compel the creditors with waiver to resort, first, to the exempt fund for payment.<sup>4</sup> But a debtor cannot waive his right to the \$300 exemption in favor of a junior lien creditor, nor can he assign it to a third person. Whatever he does not regularly claim for himself remains in the fund, to be distributed according to law. The opinion of Black, C. J., on the point, was as follows: “We are clearly of opinion that all stipulations, not to claim the \$300 made in favor of a particular creditor, are void, so far as they are intended to affect others; and that an assignment of a debtor’s right is, pro tanto, an abandonment of it. He must make his claim, if he makes it at all, in good faith, to carry out the very purpose of the law, and no other. All transfers and all waivers of his right, whether expressed or implied, inure to the benefit of his creditors in the proper order of their liens. Whatever he does not claim for himself or his family he leaves in the general fund under the control of the Court, to be distributed among those who are legally entitled to it; and such distribution is not to be regulated by any wish of his, no matter in what form he may choose to express it.”<sup>5</sup>

Nor can a defendant waive the benefit of the exemption law in favor of a junior execution creditor, so as to give him preference over a prior levy on the same property. The

<sup>1</sup> *Bowman v. Smiley*, 31 Penn. St. 225. To the same effect is case of *In re Solomon*, Am. Law T. Report 351, Aug., 1874.

<sup>2</sup> *Smiley v. Bowman*, 3 Grant’s Cases 132.

<sup>3</sup> *Bowman v. Smiley*, 31 Penn. St. 225.

<sup>4</sup> *Pittman’s Appeal*, 48 Penn. St. (12 Wright) 315.

<sup>5</sup> *Bowyer’s Appeal*, 21 Penn St. 210.

law will not tolerate him in the indulgence of preferences.<sup>1</sup>

A waiver of claim to exemption is binding, even if the debtor afterwards changes his mind, makes claim thereto in due time, and appraisement is made and returned. The waiver in the first instance, it is said, "forms part of the original contract, behind which the Court will not go."<sup>2</sup> But where a debtor agreed verbally with his execution creditor that he might levy on his store if he would leave him his furniture, and afterwards he claimed the \$300 exemption. The furniture was appraised at \$102. It was held, that there was no consideration for the agreement, and that the debtor had a right to retain the balance of the \$300 worth of property out of the store. Black, J., said: "It cannot be denied that the right of exemption may be waived. This is settled. It is true, too, that a debtor may stipulate to waive it in such a manner that he cannot afterwards claim it. In other words, a legal contract by which he agrees to let his creditor take all his property in satisfaction of the debt, is as binding as a contract on any other subject. But it must be clearly shown to have been based upon a good consideration. If it be not, it is nudum pactum, and the right is not beyond the power of revocation. A mere declaration by the debtor that he does not intend to claim it, or an expression of his willingness that the creditor may take more of the property than could be taken without his consent, amounts to nothing. When the agreement to waive the exemption is made at the time the debt is contracted, it is presumed to be part of the original contract on which credit is given. If it be made subsequently, and attested by a writing, it becomes a question of construction, whether the consideration set forth in the paper, as imported by its terms, is sufficient or not. When it is no more than a verbal agreement, and that not connected with the original credit, a consideration of benefit to the debtor, or injury to the creditor, must be shown to have been the foundation of the promise, so plainly as to make it a manifest fraud

<sup>1</sup> Bowyer's Appeal, 21 Penn. St. 210; Shelley's Appeal, 36 Penn. St. 373; Hill v. Johnston, 29 Penn. St. 362; Garrett & Martin's Appeal, 32 Penn. St. 160; Lauck's Appeal, 44 Penn. St. 395.

<sup>2</sup> Lauck's Appeal, 24 Penn. St. 426; Wallace v. Collins, 5 Ark. 41. Per contra, see Ross v. Lister, 14 Tex. 469.

on the part of the debtor to claim afterwards under the law.  
\* \* \* We cannot say that a contract to waive the right of exemption is void, merely because it was orally entered into. But we do say that an agreement of that kind under the circumstances here disclosed can seldom be safely relied on. Our only reason for not going further, and saying that a parol contract on such subject is altogether void, is, that it would be judicial legislation."<sup>1</sup>

**§ 543. Clear and precise language must be used.**—An agreement to waive the exemption made when the debt is contracted must be expressed in clear and precise language; such an agreement cannot be inferred or conjectured. In the case of *O'Neil v. Craig*,<sup>2</sup> the plaintiff took a note in which his debtor promised to pay him "the sum of \$37.50, for value received, or the homestead exemption law, without defalcation." The Court said: "We cannot say the note contained an agreement not to claim the benefit of the exemption allowed by the statute. We may conjecture that such was the debtor's intention, but that is not enough. When, therefore, judgment was recovered for the debt and an execution was issued, the debtor had a right to the exemption of his personal goods not exceeding in value \$300."

**§ 544. Confined to the express stipulations.**—When the waiver is made as to certain goods, such waiver will be strictly confined to the express stipulations in such waiver. Thus, where under a clause in a lease stipulating that all personal property on the premises should be liable to distress for rent in arrear, and that all right of exemption should be waived: held, that the waiver extends only to the property on the premises, and if notes are given for the rent in arrear, choses in action cannot be levied upon or attached; the waiver extends only to the property which has been made liable for the rent.<sup>3</sup>

<sup>1</sup> *Hoffman v. McDermond*, 1 Pitts. 197.

<sup>2</sup> 56 Penn. St. (6 P. Smith) 161.

<sup>3</sup> *Mitchell v. Coates*, 47 Penn. St. (11 Wright) 202.

**§ 545. Waiver in many States utterly void.**—On the other hand, while the waiver of the exemption is generally upheld in Pennsylvania, in other States it is questioned, and in many it is held utterly void.

In New Hampshire, where property exempted by law from attachment and execution had been attached on mesne process, a declaration of the debtor to a third person, “that he cared nothing about the property thus attached, that the creditor might have it and welcome, but that he would take care he got no more.” Held, that such action and language could not be treated as a waiver of his right of action for the taking of the property. Nor could evidence that the creditor, having heard of the declaration, proceeded to act upon it, and caused the goods to be sold on execution, avail to defeat an action brought by the debtor for taking the goods, nor in mitigation of damages.<sup>1</sup>

The same view of the question, substantially, has been taken in California, where in a suit against a plaintiff in execution for the value of household furniture sold thereunder, as being exempt, the defendant offered to show that the plaintiff agreed to place the property in the hands of a third person, to be sold for the benefit of the defendant, the creditor. Held, that the evidence was not admissible, because such agreement does not necessarily waive the exemption from forced sale.<sup>2</sup>

In the case of *Crawford v. Lockwood*,<sup>3</sup> the defendant gave his promissory note in this form: “\$33.67. Hammondsport, May 10th, 1851.—For value received, I promise to pay W. W. Bramhall, or bearer, sixty days from date, the sum of thirty-three dollars and sixty-seven cents, hereby waiving the benefit of all and every exemption of property from sale on execution under the laws of this State.” The Court held that this was no waiver; that the words used did not operate to

<sup>1</sup> *Rice v. Chase*, 9 N. H. 178; *Jordan v. Autrey*, 10 Ala. 276; *Gresham v. Walker*, 10 Ala. 370; *Frost v. Shaw*, 3 Ohio St. 270; see *State v. Melogue*, 9 Ind. 196.

<sup>2</sup> *Haswell v. Parsons*, 15 Cal. 266.

<sup>3</sup> 9 How. Prac. R. 547. See case of *In re Solomon*, Am. L. Times, 351, Aug., 1874, in Circuit Court U. S. of Virginia.

subject the defendant's exempt property to sale on execution, because a waiver cannot operate upon a right not yet in existence, and the right to have property exempt does not accrue until that property is about to be taken in execution. The Court further said, that it was doubtful whether the words "hereby waiving" would amount to an agreement or contract to waive the right to claim the property exempt. The Court intimated that the words must undergo a material change in construction before they could be converted into an agreement to take effect in futuro.

The principle of estoppel will not apply in such a case, because it relates not to a matter of fact, but to a matter of contract.<sup>1</sup>

In this last case of *Harper v. Leal*, the plaintiff made the following promissory note: "\$15.89.—For value received, I promise to pay A. & J. M., or bearer, fifteen dollars and eighty-nine cents, and the interest, on demand; *and for the payment of the same I agree to and with them to waive all exemption to property.*" The Court held that, per se, the clause in italics created no estoppel against the maker in a suit for taking property exempt by statute in an execution issued after judgment for the amount of such note. The Court went much further and said: "Not only am I of the opinion that the 'agreement in this note 'to waive all exemptions to property' creates no estoppel, but I go further, and hold that it must also be regarded, in the eye of the law, as a hard, oppressive, and unconscionable contract, and that it is totally void as in contravention of the spirit of our statutes and of public policy." Again, the same principle was affirmed in *Kneettle v. Newcomb*.<sup>2</sup> In that case, plaintiff's exempt property had been taken in execution. The note on which judgment was recovered and execution issued was given for value received, and contained the following words: "And I hereby waive and relinquish all right of exemption of any property I may have, from execution on this debt." The Court, per

<sup>1</sup> *Harper v. Leal*, 10 How. Prac. R. 276.

<sup>2</sup> 22 N. Y. 249; *Jordan v. Autrey*, 10 Ala. 276; *Kneettle v. Newcomb*, 31 Barb. 169; *Crawford v. Lockwood*, 9 How. (N. Y.) 547; *Curtis v. O'Brien*, 20 Iowa 376; *Maxwell v. Reed*, 7 Wis. 582.

Denio, J., (all the judges concurring) was of "opinion, that a person contracting a debt cannot agree with the creditor that in case of non-payment he shall be entitled to levy his execution upon property exempt from levy by the general laws of the State."

The statutes which allow the exemption are based upon views of public policy, intended for the preservation of families against the improvidence or misfortune of the head, and the latter cannot, by an executory agreement, waive such exemption. Because, if effect were given to such waiver, a few words, contained in any note or obligation, would operate to change the law between debtor and creditor, and if they were enforceable, such words would generally be inserted in obligations for small demands, and so frustrate the intention of the legislature.

So, in Iowa, it is held that a waiver of the exemption laws contained in a note will not, when a judgment is obtained on such note, entitle the plaintiff to have such execution levied upon property exempt from execution by the general laws of the State. Such an agreement would be contrary to public policy.<sup>1</sup> But when the execution defendant has voluntarily surrendered property levied upon, without claiming the exemption, he is estopped from afterwards setting up that it is exempt because it is of the character of tools with which he earns his living.<sup>2</sup>

**§ 546. Giving a delivery bond no waiver.**—A delivery bond, given for the release of exempt property, by a householder, does not estop him from claiming the exemption afterwards, and before sale. Thus, where A recovered judgment, and sued out an execution against B, who gave up certain property to the officer upon the writ, and executed a delivery bond therefor; afterwards, and before the day of sale, he claimed the property as exempt from execution; the officer refused to set it apart to him, and sold it. It was held, that the execution of the delivery bond did not estop B from setting up his claim to have the property set apart to him as exempt from execution, at any time before sale; and that the surren-

<sup>1</sup> Curtis v. O'Brien, 20 Iowa 376.

<sup>2</sup> Richards v. Haines, 30 Iowa 574.



der of his property to the officer on the writ was not a waiver of his right afterwards to claim it as exempt.<sup>1</sup>

The same points were decided in the same way in Alabama, Mississippi, and Arkansas. The Alabama Court said: "If third persons would be affected by the withdrawal of the assent of the defendant in execution, perhaps he should not be permitted to claim the statutory exemption for property which he had pointed out or delivered to the officer. But the mere waiver of the statute privilege, uninfluenced by anything extraneous, may be revoked. We can discover nothing in reason or legal analogy to prove the reverse, where the levy is assented to, or even approved, unless there is some consideration for it, either of benefit to the defendant in execution, or injury, actual or threatened, to the plaintiff, or some one else."<sup>2</sup>

#### OFFICER'S RIGHTS, DUTIES, AND LIABILITIES.

**§ 547. Levy on exempt property same as levy on third person's property.**—The rule laid down in Connecticut, in relation to seizing exempt property, is, that there cannot be any difference in the law applicable to the levy of an execution on property exempt from such levy, and a levy on the property of a third person not the execution debtor. "There is no difference in the principle that should apply in the two cases." The officer who wrongfully takes such property in execution cannot justify his action under the process placed in his hands. He is liable for trespass.<sup>3</sup> So in Alabama. If an officer having process attempts to levy it on articles exempt by law from sale on execution, after being warned that such articles are exempt, the sheriff is a trespasser, and the owner, in such case, may use such force as is necessary to prevent the levy.<sup>4</sup>

<sup>1</sup> *Ellzroth v. Webster*, 15 Ind. 21.

<sup>2</sup> *Jordan v. Autrey*, 10 Ala. 276; *Mosely v. Anderson*, 40 Miss. 49; *Atkinson v. Gotcher*, 23 Ark. 101.

<sup>3</sup> *Williams v. Miller*, 16 Conn. 144.

<sup>4</sup> *The State v. Johnson*, 12 Ala. 840; *Simpson v. Simpson*, 30 Ala. 225; *Gauble v. Reynolds*, 42 Ala. 236; *Freeman v. Smith*, 30 Penn. St. 264. See *Harleman v. Buck*, 30 Penn. St. 267, and 39 Penn. St. 213.



**§ 548. The sheriff must decide, on his own responsibility,** whether property claimed as exempt from execution under the exemption laws be so exempt or not.<sup>1</sup>

In some of the States, the officer is bound to protect the rights of the debtor in execution, and to apprise the defendant in execution of his rights, whether it be property seized, wages or money garnisheed.<sup>2</sup>

**§ 549. Care of the officer in laying aside property exempt.**—If the officer holding an execution would protect himself, he must be careful in selecting and laying aside goods or chattels that are exempt from such execution; or, where goods of the value of a certain amount under the particular statute are exempt, he should cause an inventory and appraisement to be made of the whole property, and set aside goods to the amount allowed by law to the debtor.<sup>3</sup>

**§ 550. Officer who abuses his authority, same as if no authority.**—Where an officer seizes property under a lawful execution, but afterwards abuses his authority, he is in the same situation as though he had acted without authority. Thus, in the case of *Wilson v. Ellis*,<sup>4</sup> where a constable, who had seized the property of a defendant under an execution, and sold it without an appraisement, although a demand for an appraisement was duly made by the defendant, the Court said: “In some cases, an act which was in the first instance lawful becomes afterwards a trespass ab initio. Here, the levy was lawful, but the sale, without an appraisement upon request made, was an abuse of the authority contained in the writ to levy and sell; and this abuse rendered the constable a trespasser ab initio. It was not a mere nonfeasance, or negative abuse of authority; for selling the goods without an appraisement was an act unauthorized by law, and left the constable in the same situation as though his acts had been illegal from the commencement. For, where the law has given authority, it will protect persons from the abuse of the author-

<sup>1</sup> *Houston v. Smith*, 1 Phila. R. 221.

<sup>2</sup> State to use of, *Conklin v. Barada*, 57 Mo. 562.

<sup>3</sup> *Elliott v. Whitmore*, 5 Mich. 532; *Wyckoff v. Wyllis*, 8 Mich. 48.

<sup>4</sup> 28 Penn. St. 239.

ity, by leaving the abuser in the same situation as though he had acted without any authority." <sup>1</sup>

**§ 551. Fraud on the part of debtor no justification of officer.**—Nor will the officer who makes a levy on property claimed as exempt be allowed to show, in an action for the recovery of such property, that the debtor had other property than that levied upon, subject to execution.<sup>2</sup> An officer who takes exempt property on execution wrongfully cannot justify himself by the claim that he did not know what portion of the property was exempt, not even if the debtor made no claim of exemption. "The mere silence of the party while an officer is stripping him of property exempt from seizure under color of legal authority, furnishes no protection to the wrong-doer." Nor can an officer claim on behalf of one creditor for whom he acts, the benefit of a waiver of the exemption in favor of another creditor.<sup>3</sup>

**§ 552. Bond given to officer, as inducement to sell, void.**—A bond given to an officer in order to induce him to sell property exempt from execution, will be no protection, as such bond is null and void. The consideration for such bond, being illegal and for an act in violation of law, cannot be enforced.<sup>4</sup>

**§ 553. Party disclaiming ownership cannot sue officer for taking goods.**—A defendant in an execution cannot bring an action against the sheriff for taking and selling goods, which would have been exempt, which the debtor disclaimed having any title to, when the levy was made.<sup>5</sup> Nor is

<sup>1</sup> To the same effect as to the question of trespass, *Bac. Ab. B. Tit. Trespass*, pl. 4; *Dresor v. King*, 34 Penn. St. 201; *Allen v. Crofoot*, 5 Wendell 506; *Sackrider v. McDonald*, 10 John. R. 253; *Smith v. Gates*, 21 Pick. 55; *Purrington v. Loring*, 7 Mass. 387; *Kerr v. Sharp*, 14 S. & R. 399; *Hasard v. Israel*, 1 Binn. 240.

<sup>2</sup> *Austin v. Swank*, 9 Ind. 109; *Atkinson v. Gotcher*, 23 Ark. 101.

<sup>3</sup> *Frost v. Mott*, 34 N. Y. 253; *Cornelia v. Ellis*, 11 Ill. 585; but see *Cook v. Scott*, 6 Ill. (1 Gill.) 333; *Bonnell v. Bourman*, 53 Ill. 460; *Smother v. Halley*, 47 Ill. 331; *The People v. Palmer*, 46 Ill. 398; *Atkinson v. Gotcher*, 23 Ark. 101.

<sup>4</sup> *Renfro v. Heard*, 14 Ala. 23.

<sup>5</sup> *Gilleland v. Rhoades*, 34 Penn. St. 187.

such a defendant who disclaims title when the levy is made, entitled to have such goods subsequently set apart to him.<sup>1</sup>

**§ 554. No property exempt for purchase-money.**—In many of the statutes exempting property from forced sale, it is declared that the exemption of property therein authorized shall not extend to an execution on a demand for the purchase-money of such property. The word “purchase-money” is held to mean the original demand for the property sold. Thus, where an execution is issued upon a judgment recovered in an action for taking personal property without the consent of the owner, such execution is not to be considered to be issued on a demand for the purchase-money, and is not within the statute.<sup>2</sup> Nor does it include a demand on the security given for the purchase-money, when the security is given by a third person.<sup>3</sup>

So, crops on leased land were held not to be exempt, on the ground that the landlord had a vendor's lien in the way of purchase-price.<sup>4</sup>

**§ 555. Debtor's right to dispose of exempt property.**—Under the later decisions, it is a rule of law, now well established, that the debtor or head of a family may dispose of the exempt property in any way he may think proper; and a purchaser from him takes them free, and may maintain an action against the sheriff for a subsequent levy and sale.<sup>5</sup> This right of disposition on the part of the execution debtor may be exercised after the execution comes into the hands of the sheriff, and by such sale he will convey a good title.<sup>6</sup> So,

<sup>1</sup> *Strouse v. Becker*, 38 Penn. St. 190; *Cassell v. Williams*, 12 Ill. 387; *Holman v. Martin*, 12 Ind. 553; *Boyd v. Curlin*, 1 Humph. (Tenn.) 466.

<sup>2</sup> *Hoyt v. Van Alstyne*, 15 Barb. 568. See Chap. IX, Vendor's Lien.

<sup>3</sup> *Davis v. Peabody*, 10 Barb. 91. See Chap. XIII, Bankruptcy. *Cox v. Stafford*, 14 How. Pr. 519; *Craft v. Curtis*, 25 How. Pr. 163; *Hickox v. Fay*, 36 Barb. 9; *Mathewson v. Willer*, 3 Denio 52; overruled in *Cole v. Sterns*, 6 How. P. 424, and *Cole v. Sterns*, 9 Barb. 676.

<sup>4</sup> *Davis v. Meyers*, 41 Ga. 95; *Phelps v. Porter*, 40 Ga. 485; *Talliafero v. Pry*, 41 Ga. 622; *Harrell v. Fagan*, 43 Ga. 339.

<sup>5</sup> See Bankruptcy Chap., Secs. 489, 516. *Cook v. Baine*, 37 Ala. 350; *Pool v. Reid*, 15 Ala. 826.

<sup>6</sup> *Pool v. Reid*, 15 Ala. 826; *Paxton v. Freeman*, 6 J. J. Marsh. 234.

in Indiana, it has been held, that where \$300 worth of property has been set off to a debtor under the exemption law, such property may afterwards be sold by him, discharged from the lien of the execution.<sup>1</sup>

So, in North Carolina, where A, to whom certain articles of personal property had been allotted under the personal property exemption act, sold and transferred the same to B, for a valuable consideration ; afterwards, the articles having been seized by a constable under attachment against A's property, B rescinded his contract with A, and the property was sold by the officer. It was held, in a suit against the officer, that A, the plaintiff, had a right to recover the value of the property at the time of its seizure.<sup>2</sup>

**§ 556. The exchange of exempt property for other goods or money** does not, in Alabama, make the goods or money so received in exchange liable to be sold on execution.<sup>3</sup>

But in North Carolina, it would seem that in order to exempt such articles received in exchange for exempt property, it is necessary to have such exchanged goods set apart by a second allotment.<sup>4</sup>

While in Iowa, the exchange of exempt property, such as homestead, policies of insurance, or the team with which the head of a family habitually earns his living, for articles of merchandise, such merchandise will not be clothed with the exemption, but will remain liable to the payment of his debts.<sup>5</sup>

**§ 557. Fraudulent sale or concealment of property.**—In many of the States the fraudulent sale of property, or concealment, does not deprive the debtor of the exemption ; while in others he is denied all protection of its benefits.

In Alabama, it is held that the articles exempted by law

<sup>1</sup> Godman v. Smith, 17 Ind. 152.

<sup>2</sup> Duvall v. Rollins, 68 N. C. 220 ; Frost v. Naylor, 68 N. C. 325.

<sup>3</sup> Cook v. Baine, 37 Ala. 350 ; Brewer's Adm. v. Granger, 45 Ala. 580. Per contra, Friedlander v. Mahoney, 31 Iowa 311.

<sup>4</sup> Lloyd v. Durham, 1 Winston 288.

<sup>5</sup> Friedlander v. Mahoney, 31 Iowa 311.

from sale on execution are not rendered subject to such sale, in consequence of the head of the family fraudulently disposing of all the rest of his property. The reason assigned for this ruling is, that the plain design of the legislature was, as far as practicable, to secure to the use of the family the exempt articles against the folly or improvidence of the head of the family. His fraudulent conduct, as it respects the rest of his property, cannot be visited on his family so as to deprive them of the right thus secured to them by law.<sup>1</sup> So, in Mississippi, the fraudulent sale by a debtor of all his property, except that exempt from execution, will not debar him from claiming the exemption of such property from seizure.<sup>2</sup>

In Indiana, it is held that where a person conveys property, whether the sale is fraudulent or not, the grantor can be regarded as having no title. None against his grantee, and as against his creditors he can have no right if the sale is fraudulent. "If he conveyed the property, though fraudulently, that conveyance divested him of all interest in it. If the grantee was privy to the fraud, his title is void as against the creditors of the grantor. If he was not privy to the fraud, and obtained the property for an adequate consideration, he will hold it against the grantor and his creditors. In either event, however, the question must arise between the grantee and those creditors."<sup>3</sup> It is held that in no case can a man avail himself of his own fraud. But when an attempted fraud neither injures his creditors nor benefits himself, it seems that the attempt to commit a fraud is nugatory to affect his exemption, one way or the other.<sup>4</sup>

The rule adopted in New York is to the same effect as those in Indiana, where it is held that if there be an appearance from circumstances that the claimant of property as exempt from execution under the statute has reduced himself to exempt property by disposing of or covering up all his other

<sup>1</sup> *Calloway v. Carpenter*, 10 Ala. 500 ; *Cook v. Baine*, 37 Ala. 350 ; *Mosely v. Anderson*, 40 Miss. 49.

<sup>2</sup> *Mosely v. Anderson*, 40 Miss. 49 ; see Secs. 489 and 517, Bankruptcy.

<sup>3</sup> *Mandlove v. Burton*, 1 Ind. 41.

<sup>4</sup> *Holmes v. Welch*, 12 Ind. 555. .

property in order to defraud his creditors, he will be placed beyond the reach of the statute.<sup>1</sup>

In Pennsylvania, the rule has been uniform, from its earliest decisions, under the law of 1849, to the present time, that if a debtor has fraudulently concealed or removed any of his other property it will bar him of all claim to exemption.<sup>2</sup>

It is said that the rule of decision which denies the benefit of the exemption law to a dishonest debtor, who shuffles and conceals his property, denies his ownership, and falsely alleges title in his wife or other relatives or friends, with a view of eluding the vigilance of the officer who has an execution to levy, is founded on a sound morality, and is agreeable to the spirit and intention of the exemption law.

**§ 558. Joint ownership of property.**—The exemption law applies to personal property owned by two persons in partnership, as partnership property, when the execution is against both partners, in like manner as if owned by one of them separately, both claiming the exemption.<sup>3</sup> But a tenant owning property in common, under the laws of Wisconsin, is not entitled to the exemption of property not severable, as for instance, a horse, buggy, and harness, when the exemption is claimed by one of such joint owners.<sup>4</sup>

But the rule is otherwise where the property is in its nature capable of severance, as where several tenants in common owned grain and other personal property, and where the share of each might be determined by weight or measurement, and be severed or appropriated by one tenant without the consent of the others.<sup>5</sup>

In New York, to entitle a person to the benefit of the exemption law he need not be the sole owner of the chattel claimed as exempt. It is held in that State that the provisions of the exemption act extend as well to property that

<sup>1</sup> Brackett v. Watkins, 21 Wend. 68.

<sup>2</sup> McCarthy's Appeal, 68 Penn. St. (18 P. Smith) 217; Strous's Ex. v. Becker, 38 Penn. St. 190; Emerson v. Smith, 51 Penn. St. 90. See 30 Penn. St. 264; Smith v. Emerson, 43 Penn. St. 456; Huey's Appeal, 29 Penn. St. 219.

<sup>3</sup> Gilman v. Williams, 7 Wis. 329.

<sup>4</sup> Wright v. Pratt, 31 Wis. 99.

<sup>5</sup> Newton v. Howe, 29 Wis. 531; West v. Ward, 26 Wis. 579.

is held in partnership or in common, as to that owned in severalty.<sup>1</sup>

In Massachusetts, it is held that the statute does not apply to implements, tools, stock, and materials used for carrying on a partnership business. "The exemption is several, and not joint. It applies to the debtor in the singular number, and is personal and individual only. If he desires to form a partnership and combine his means with those of one, or more than one person, he must take the precaution to retain exclusive ownership of his tools and implements, allowing the use of them to his associates, or he will lose entirely the benefit of the statutory exemption as to that kind of property."<sup>2</sup>

In California, it is held, that personal property which is exempt from forced sale on execution is none the less exempt because the judgment debtor owns an undivided interest in it, in common with a stranger to the judgment.<sup>3</sup>

#### EARNINGS—WAGES.

§ 559. In most of the States the exemption laws protect the earnings or wages of the heads of families for a varied period of time. The intent of the law is that the earnings or wages of such person should not be intercepted by creditors, but be reserved to supply the debtor and his family with the necessities of life.

Dixon, C. J., in *Brown v. Hebard*,<sup>4</sup> in speaking of the word "earnings," gave the following definition: "It is not easy, perhaps, to determine the precise application of this word as used in the statute. I think a correct definition to be, the gains of the debtor derived from his services or labor without any capital. If the debtor has no capital and no credit contributing to increase his profits, except the credit arising from the labor or service in which he is presently engaged, and out of the proceeds of which his obligations on ac-

<sup>1</sup> *Radcliff v. Wood*, 25 Barb. 52; *Hoyt v. Van Alstyne*, 15 Barb. 571; *Stewart v. Brown*, 37 N. Y. 350.

<sup>2</sup> *Pond v. Kimball*, 101 Mass. 105.

<sup>3</sup> *Servanti v. Lusk*, 43 Cal. 238.

<sup>4</sup> 20 Wis. 326.



count of such labor and services are to be discharged, then I think his net receipts or gains from such labor or service may fairly be accounted earnings.”

**§ 560. Exemption of wages—To whom it applies.—** Such law extends to overseers as well as laborers, who, by agreement with their employers, are to be paid their wages daily or weekly, to enable them to supply the necessities of life to their families ;<sup>1</sup> and a master workman, who makes a profit on the labor of his workmen, can claim such profits as exempt from attachment or execution, under an act exempting wages from execution.<sup>2</sup>

**§ 561. Garnishment—When and how wages affected.** Statutes exempting the earnings of the debtor for his personal services, or those of his family, at any time within thirty, sixty, or ninety days, as the case may be, preceding the levy, do not authorize the creditor to seize those accruing after that date by garnisheeing the employer. In such a proceeding, there arises no liability on the part of the employer unless there should accrue, at some time subsequent to the garnishment, an indebtedness, on his part, to the employee, for more than the time prescribed in such law.<sup>3</sup>

**§ 562. A garnishee who pays over money which constitutes a part of the personalty exemption of the debtor, does so at his own risk.** He will be liable to the debtor (his creditor) for the full amount of the money he has paid.<sup>4</sup> A person who has been brought into Court as a garnishee may answer that the property of the debtor, in his hands, or his indebtedness to such debtor, is exempt by law from seizure on attachment or execution,<sup>5</sup> and he is bound to

<sup>1</sup> *Cracker v. Mathews*, 25 Ga. 571 ; *Russell v. Arnold*, Id. 625.

<sup>2</sup> *Penn. Coal Co. v. Costello*, 33 Penn. St. 241 ; *Brown v. Hubbard*, 20 Wis. 326 ; *Kuntz v. Kinney*, 33 Wis. 510. But see *Smith v. Brooke*, 49 Penn. St. 147.

<sup>3</sup> *Davis v. Humphrey*, 22 Iowa 137 ; *Caraker v. Mathews*, 25 Ga. 571.

<sup>4</sup> *Watkins v. Cason*, 46 Ga. 444 ; *Pierce v. Chicago and Northwest. R. R. Co.*, Sup. Ct. Wis., Cent. L. Jour., June 11, 1874.

<sup>5</sup> *Winterfield v. Mil. and St. Paul R. R. Co.*, 29 Wis. 589. See as to rights of debtor for money due, claimed as exempt, and officer's duty, *State v. Barada*, 57 Mo. 562.



bring the fact to the notice of the Court, otherwise the judgment against such garnishee, and the satisfaction thereof, will not bar an action against him by the attaching debtor. Thus, where one Pierce, "a resident of Wisconsin, had a claim for wages (which, by the law of that State, was exempt from attachment and from garnishment) against a railroad company, existing under charters from the States of Wisconsin and Illinois. In attachment suits brought against Pierce, in Illinois, the railroad company was garnisheed for the amount of its indebtedness to him. There was no personal service on Pierce, of any summons, or notice of any process; and he had no actual notice of any of the proceedings, and did not appear in any manner therein. Judgments were recovered against him, and also against the defendant company as garnishee; and the company satisfied the judgment against it. Afterwards, an action was brought by Pierce against the company, upon his said claim. Held, that it was the duty of the company, in the garnishee proceedings, to exhaust all means to avoid a judgment against it, and for this purpose to bring to the notice of the Court the fact that Pierce's claim was exempt; or to notify Pierce of the proceedings, and request him to defend; and having failed to do either of these things, it is not protected in the action of Pierce against the company by the judgment in garnishment against it, and the satisfaction thereof." It was further held, that in the absence of proof to the contrary, the Court would presume that the exemption laws of Illinois were the same as those of Wisconsin.<sup>1</sup>

**§ 563. Two or more classes of exemption to one person.**—Under statutes which specify exempt articles, such as household furniture, mechanical tools, etc., such specifications are cumulative; as in the case of a man who is both the head of a family and a mechanic, he will be entitled to hold both classes of exempt articles.<sup>2</sup>

So, a man who keeps a tavern and boarding-house, and

<sup>1</sup> *Pierce v. The Chicago and Northwestern R. R. Co.*, Sup. Ct. Wis., June T., 1874, Cent. L. Jour., June 11, 1874.

<sup>2</sup> *Harrison v. Martin*, 7 Mo. 286.

works at his trade as a tailor part of the time, may also be a person engaged in cultivating the soil, and as such agriculturist is entitled to the exemption allowed to such class of persons, and the implements of his trade or calling.<sup>1</sup>

But in Michigan, if a person claiming an exemption be engaged in several kinds of business, they will not all be taken into consideration. The exemption will be confined to one branch of business, that in which the debtor is wholly or principally engaged.<sup>2</sup>

**§ 564. Tools of a mechanic—Trade.**—The implements of a debtor's trade, which are exempt from seizure and sale, are the tools of a mechanic used in carrying on his business.

In general, to come within the meaning of this signification, the debtor must be a mechanic in contradistinction to a manufacturer: the implements must be tools, in contradistinction to machinery.

Where the owner of tools is not a tradesman, and does not use the tools himself, but employs others to work for him, the tools are not exempt from execution. "If the exemption is allowable in any case it must be confined to the case of a debtor who uses the tools in his trade, and not to one who employs others to work for him."<sup>3</sup> In a recent case in Connecticut, the rule is laid down substantially as follows: "The implements of a debtor's trade," within the meaning of the statute exempting them from execution, are tools of a mechanic used in carrying on his business. Such tools are exempt, although of an improved and expensive character. But they must be strictly tools, in contradistinction to machinery. The fact that a mechanic, while carrying on a trade, is also a manufacturer, will not prevent the exemption of such tools as he uses in person in his trade. Nor will the fact that he is carrying on a trade extend the exemption to implements used by him as a manufacturer. In one case, a

<sup>1</sup> Springer v. Lewis, 22 Penn. St. 191; Eager v. Taylor, 9 Allen 156; Patten v. Smith, 4 Conn. 455.

<sup>2</sup> Morrill v. Seymour, 3 Mich. 64; Kenyon v. Baker, 16 Mich. 373; Smalley v. Masten, 8 Mich. 529; Atwood v. De Faut, 19 Conn. 518.

<sup>3</sup> Abercrombie v. Alderson, 9 Ala. 981; Atwood v. De Forest, 19 Conn. 518.

debtor carried on the business of book-binding and manufacturing blank books, working himself and employing four hands. He had sundry machines for doing different parts of the work, all of which were operated by hand, and all of which, as well as the tools used, would have been needed if he had done the work alone. Held, that the machines were not exempt, but all the tools were.<sup>1</sup>

But the expression "working tools" is construed to include not only such tools as are indispensably necessary to the mechanic, or even such as are in general use by individuals of the same craft, but also such as the individual has adopted to facilitate and diminish his labor, and not only working tools, so called by the learned, but such as are so called by the craft, such as the individual uses and has set apart as tools for the advantageous prosecution of his business.<sup>2</sup>

Thus, a sewing machine was held exempt when it was necessary for carrying on the trade or business of the debtor, even if the debtor himself did not know how to use it.<sup>3</sup> So the tools, implements, and fixtures of a milliner have been held to be exempt.<sup>4</sup>

At one time, in Massachusetts, the word "tools" received a stricter interpretation; thus Parker, C. J., in *Buckingham v. Billings*,<sup>5</sup> in speaking of the statute of 1805, said: "This statute, as it is in derogation of the common rights of creditors to secure their debt out of the property of their debtors, ought to have a strict construction. \* \* It is not to be supposed that it was designed to comprehend within the term 'tools' (which are properly small articles used by the hand) complicated machinery or expensive utensils which may of themselves be of great value. \* \* \* When the tools of a trade are exempted without any limitation, we are necessarily led

<sup>1</sup> *Seeley v. Gwillim*, 40 Conn. 106; *Atwood v. De Forest*, 19 Conn. 513; *Knox v. Chadbourne*, 28 Maine 160; *Norris v. Hoitt*, 18 N. H. 197; *Parkerson v. Wightman*, 4 Strob. 363.

<sup>2</sup> *Healy v. Bateman*, 2 Rhode Island 454; *Tellinghast v. Brodline*, 5 Rhode Island 205.

<sup>3</sup> *Dowling v. Clark*, 1 Allen 283; *Dowling v. Clark*, 3 Allen 571; *Rayner v. Whicher*, 6 Allen 293.

<sup>4</sup> *Wood v. Keyes*, 14 Allen 236.

<sup>5</sup> 13 Mass. 82; *Patten v. Smith*, 4 Conn. 450.

to the conclusion that the term tools was used in the statute to designate those implements which are commonly used by the hand of one man in some manual labor necessary for his subsistence." But this rule has been departed from in subsequent cases.

The meaning of the term "tools" was further elucidated in *Howard v. Williams*,<sup>1</sup> where they were defined to be such as enabled a debtor to carry on his trade in a convenient and usual manner. In that case, the tools of the debtor's apprentices were held to be exempt.

"The word 'tools' is not understood, either in its strict meaning or popular use, as designating complicated machinery, which, in order to produce any useful effects, must be worked by combining several distinct parts or separate pieces, the aid of more hands than one being necessary to perform the operation."<sup>2</sup>

The statute has been held to apply to the case of a boot-maker, carrying on a small business, although he employs a number of men under him in carrying on the business, working more or less with the tools and implements himself, but being generally engaged in superintending his workmen; and that sewing machines of simple construction are of the character of those exempted by the statute.<sup>3</sup>

The rule may be stated to be, that every implement that is necessary, usual, or convenient to a handicraftsman, will be exempt.<sup>4</sup>

**§ 565. Temporary suspension of trade.**—A mechanic who temporarily suspends his occupation, as such, does not thereby lose the right to have his tools exempt from levy and sale.<sup>5</sup> But it is otherwise where he ceases to follow his trade or calling.<sup>6</sup>

<sup>1</sup> 2 Pick. 81.

<sup>2</sup> *Kenyon v. Baker*, 16 Mich. 373; *Danforth v. Woodward*, 10 Pick. 423; *Patten v. Smith*, 4 Conn. 450.

<sup>3</sup> *Daniels v. Hayward*, 5 Allen 43.

<sup>4</sup> *Davlin v. Stone*, 4 Cush. 359; *Parkerson v. Wightman*, 4 Strob (S. C.) 363; *Wilkinson v. Alby*, 45 N. H. 551. See Secs. 510, 511, 512.

<sup>5</sup> *Caswell v. Keith*, 12 Gray 351.

<sup>6</sup> *Davis v. Wood*, 7 Mo. 162.

**§ 566. The printing or stamping blocks of a painter of oilcloths, used in a business requiring peculiar and extensive buildings, many workmen, and considerable capital, are not “necessary tools of a tradesman,” and exempt.** The Court held that the blocks, etc., were “tools” of trade, but that a manufacturer was by no means a tradesman within the meaning of the act, whatever he might be in popular parlance. The Court said: “With us, it” (the term tradesman) “is scarcely ever applied to persons engaged in the business of buying and selling, and is clearly not so used in the statute under consideration, but is generally, if not unvaryingly, accepted as signifying mechanics and artificers of every kind, whose livelihood depends upon the labor of their hands.”<sup>1</sup>

**§ 567. A mill saw is not a tool, and is not exempt under a clause in a statute exempting tools.**<sup>2</sup> So of a peg machine held not exempt, although shown to be worked part of the time by hand, and actually a tool in the strict sense of the word.<sup>3</sup>

The tools, implements, materials, stock, and fixtures of a paper mill are not exempt.<sup>4</sup>

**§ 568. A threshing machine, used by a farmer to thresh the grain of other people for hire, is not exempt.**<sup>5</sup> Nor a portable machine called “Billy and Jenny,” for manufacturing cloth.<sup>6</sup>

**§ 569. Printers and editors—Printing press, type, exempt.**—Materials used in certain kinds of business, although not strictly speaking “tools,” will, nevertheless, come within the statute exempting property from execution. Thus, where it was shown that a party depended entirely upon his trade as a printer and editor for means of support, his printing press

<sup>1</sup> *Ritchie v. McCauley*, 4 Penn. St. 472; *McDowell v. Shotwell*, 2 Whart. 26.

<sup>2</sup> *Batchelder v. Shopleigh*, 10 Maine 135.

<sup>3</sup> *Knox v. Chadbourne*, 28 Maine 160. See also *Kilburn v. Demming*, 2 Vt. 404; *Wetherby v. Foster*, 5 Vt. 136.

<sup>4</sup> *Smith v. Gibbs*, 6 Gray 298.

<sup>5</sup> *Ford v. Johnson*, 34 Barb. 364; *Meyer v. Meyer*, 23 Iowa 376.

<sup>6</sup> *Kilburn v. Demming*, 2 Vt. 404.

and materials necessary for the exercise of his trade, were held exempt. The instruments and tools, to be exempt, must be necessary, and not merely convenient for the exercise of the trade by which the debtor gains a living.<sup>1</sup>

In the case of *Sallee v. Waters*,<sup>2</sup> the Court decided that the press and type of a practical printer, which are necessarily used by him and his journeymen in the publication of a newspaper, are tools or implements of trade within the meaning of the statute exempting certain articles from levy and sale on execution; but that the paper and ink was rather stock in trade, and not within the purview of the statute. "Printing press, cases, types, etc., may be tools within the meaning of the statute exempting certain property from execution."<sup>3</sup> But in Massachusetts and Vermont it is held otherwise.<sup>4</sup>

**§ 570. The commercial books and counting-house furniture of a merchant, and iron chests found in the counting-house, in which his books and papers are kept, in Louisiana, are exempt from seizure.<sup>5</sup>**

**§ 571. The instruments of a dentist are included in the words "mechanical tools," and are therefore exempt; so is his sign.<sup>6</sup>**

The instruments of a surgeon are exempt as his tools.<sup>7</sup>

Professional books, used by a professional man, who supports his family by the exercise of his profession, are exempt from execution, as part of his family library.<sup>8</sup>

**§ 572. Watches and clocks are not exempt unless specifically mentioned in the statute, as a general rule.<sup>9</sup> But**

<sup>1</sup> *Prather v. Bobo*, 15 La. An. 524.

<sup>2</sup> 17 Ala. 482.

<sup>3</sup> *Patten v. Smith*, 4 Conn. 450.

<sup>4</sup> *Danforth v. Woodward*, 10 Pick. 423; *Spooner v. Fletcher*, 3 Vt. 133.

<sup>5</sup> *Farmers' Bank v. Franklin*, 1 La. An. 393.

<sup>6</sup> *Duperron v. Cammury*, 6 La. An. 789; but see cases of *Whitcomb v. Reid*, 31 Miss. 567; *Grimes v. Byrne*, 2 Minn. 89; *Maxon v. Perrott*, 17 Mich. 332.

<sup>7</sup> *Robinson's Case*, 3 Abbot's Pr. R. 466.

<sup>8</sup> *Robinson's Case*, 3 Abbot's Pr. R. 466; *Lambeth v. Milton*, 2 Robinson (La.) 81.

<sup>9</sup> *Rothschild v. Boelter*, 18 Minn. 361; *Leavitt v. Metcalf*, 2 Vt. 342; *Smith v.*

under some circumstances a watch or clock may be so necessary, that, when in actual use, either of them may be within the description of necessary household furniture, when the business of such householder is such that some sort of a time-piece is necessary, and therefore would be exempt.<sup>1</sup> But when a watch is carried for mere convenience, it will not be exempt.<sup>2</sup> So of articles which are merely ornamental, or articles which may be useful, though not absolutely necessary.<sup>3</sup>

**§ 573. Musical instruments by which a musician earns his living are exempt.**<sup>4</sup>—But it is necessary, according to the view of some of the Courts, that such musician should constantly follow such profession as a calling in order to have such musical instruments exempt. Thus, where a plaintiff in a case was a pianist, and had taught music for pay within three months prior to the time of the seizure, the Court held that that was not sufficient to show that teaching music was at that time his business.<sup>5</sup> But a piano is not exempt under the heading of necessary household furniture.<sup>6</sup>

**§ 574. Necessary article—Question of fact.**—Whether any article or chattel claimed under the exemption law is “necessary” is a question of fact under the circumstances of each case.<sup>7</sup>

Thus, where it was proved that a man was taking his vegetables to market, to exchange them for articles of prime necessity in his family, or to obtain the means of paying his taxes, it was held that he would not be deprived of his right to insist that such articles were actually provided for family use, and exempt from seizure and sale on execution.<sup>8</sup>

Rogers, 16 Ga. 479; *Bitting v. Vandenburg*, 17 How. 80; *Wilson v. Ellis*, 1 Denio 462.

<sup>1</sup> *Leavitt v. Metcalf*, 2 Vt. 342.

<sup>2</sup> *Bitting v. Vandenburg*, 17 How Pr. 80; *Wilson v. Ellis*, 1 Denio 462.

<sup>3</sup> *Towns v. Pratt*, 33 N. H. 345; *Frazier v. Barnum*, 19 N. J. Eq. 316.

<sup>4</sup> *Goddard v. Choffee*, 2 Allen 395.

<sup>5</sup> *Tanner v. Billings*, 18 Wis. 163.

<sup>6</sup> *Dunlop v. Edgerton*, 30 Vt. 224.

<sup>7</sup> *Dains v. Prosser*, 32 Barb. 290; *Whitmarsh v. Angle*, 3 Code R. (N. Y.) 53; *Griffin v. Sutherland*, 14 Barb. 456; *Willson v. Ellis*, 1 Denio 462.

<sup>8</sup> *Shaw v. Davis*, 55 Barb. 389; *Sickler v. Jacobs*, 14 Johns. 434.



§ 575. A new article that has never been used, but which was procured in good faith for use, and which is necessary for carrying on a man's occupation, will be exempt. Thus, a new tow-line, which had never been used, but which had been procured by the debtor, a boatman, and prepared for use, which was proved to be necessary in the navigation of the boat, was held exempt.<sup>1</sup> But whether the boat cable and anchor of a vessel can be attached, and so separated from the vessel, will depend upon the situation of those articles in relation to the vessel. When these articles are in actual use, and necessary to the safety of the vessel, they cannot be taken. But if the vessel is at a wharf, and the articles not in use, they may be attached.<sup>2</sup>

#### ANIMALS.

§ 576. The term "work horse," "team," etc., used in the statutes, is construed to mean such team or work horse as is required for the ordinary purposes of the family.<sup>3</sup> A horse kept for the prosecution of a business or livelihood, outside of the requirements of the family, is not exempt.<sup>4</sup> But to entitle a debtor to claim a horse as exempt, it is not necessary to prove that the horse is a draught horse and has been used for that purpose. "A 'work horse' means one that performs the common drudgery of the homestead: as to haul wood, to draw the plow, to carry the family to church, either under the saddle or in harness"; and he need not have performed all of these services if he is intended in good faith for the purpose.<sup>5</sup>

§ 577. A professional man might be entitled to two horses if by their use he habitually earned his living; and this exemption of two horses would be sustained, although he

<sup>1</sup> *Fields v. Moul*, 15 Abb. Pr. R. 6.

<sup>2</sup> *Briggs v. Strange*, 17 Mass. 405; *Potter v. Hall*, 3 Pick. 368.

<sup>3</sup> *Allman v. Gunn*, 29 Ala. 242; *Mundell v. Hammond*, 40 Vt. 641; *Cook v. Baine*, 37 Ala. 350; *Mathews v. Redwine*, 25 Miss. 99.

<sup>4</sup> *Robinson v. Myers*, 3 Dana 441; *Calhoun v. Knight*, 10 Cal. 393; *Brusie v. Griffith*, 34 Cal. 302.

<sup>5</sup> *Noland v. Wickham*, 9 Ala. 169.



drove them singly. "That is to say, if his business was such that he needed to use and did use both horses in a single buggy, both would be exempt as fully and entirely as though he used them both together, or as a team in a double buggy."<sup>1</sup>

**§ 578. What must be shown—Teamster.**—When a "team" is claimed as exempt from execution on forced sale, it must be shown that the party claiming the exemption habitually earned his living by the use of such "team"—in other words, a teamster who does hauling for a living, with his own team, to support himself and his family. It is not essential that he drive the team himself, so long as he is engaged personally in the business habitually.<sup>2</sup>

Where a clerk in a store, at a stated salary, purchases a "team" for his son, under age, who does the teaming, such team will not be exempt, though the work was done for the benefit of the father and family. A clerk, carpenter, or other mechanic whose time is occupied at other pursuits, does not become a teamster in the sense of the statute.<sup>3</sup>

**§ 579. Teamster, team, wagon.**—The New York exemption act does not exempt a wagon in terms, neither does it exempt a horse or two horses, but they are exempt nevertheless as a "team," by which a man earns his living. It is held, in that State, that a team consists of one or more horses, with their harness, and the vehicle to which they are attached.<sup>4</sup> And this, whether the number of animals composing the team consists of one, two, three, four, or more. A team may be formed with either of these numbers.<sup>5</sup>

Where one follows the business of tanner, though he use a

<sup>1</sup> *Corp v. Griswold*, 27 Iowa 379; *Van Buren v. Loper*, 29 Barb. 338; *Wheeler v. Cropsy*, 5 How. 288.

<sup>2</sup> *Harthouse v. Rikers*, 1 Duer 606; *Calhoun v. Knight*, 10 Cal. 393; *Whicher v. Long*, 11 Iowa 48.

<sup>3</sup> *Brusie v. Griffiths*, 34 Cal. 302.

<sup>4</sup> *Hutchins v. Chamberlain*, 11 N. Y. Lag. Obs. 248; *Eastman v. Caswell*, 8 How. Pr. R. 75; 5 Id. 228, overruling *Morse v. Keys*, 6 How Pr. 18; *Woodruff v. Cook*, 25 Barb. 505; *Daines v. Proser*, 32 Barb. 290; *Hoyt v. Van Alstyne*, 15 Barb. 568.

<sup>5</sup> *Wilcox v. Hawley*, 31 N. Y. 648; *Bevitt v. Crandall*, 19 Wis. 581; *Harthouse v. Rikers*, 1 Duer 606; *Lockwood v. Younglove*, 27 Barb. 505.

horse in his business, such horse would not be exempt, not being necessary to his trade.<sup>1</sup>

So, a wagon used by the owner in carrying on the business of selling patent couplings is not exempt.<sup>2</sup>

The term "wagon," used in exemption statutes, is intended to mean a common vehicle for the transportation of goods and merchandise, not a hackney coach for the transportation of passengers.<sup>3</sup>

But Courts will give a liberal construction to statutes, so as to include under the foregoing term, "one wagon," a buggy or pleasure carriage, when it is the only one owned by the debtor.<sup>4</sup>

**§ 580. Animals—Fraud in selling.**—A person having two yoke of oxen, and selling one yoke, retaining and working the other, though such sale be in fraud of creditors, the yoke he retains is exempt.<sup>5</sup>

**§ 581. A heifer is included** in the term cow, and is exempt as such, where the owner has no other animal or animals<sup>6</sup> under the exemption of a cow for the use of the family. If a debtor owns two cows, one of which is subject to mortgage, the one which is not mortgaged is exempt.<sup>7</sup>

**§ 582. Food, for exempt animals,** is by many of the statutes exempt, in some during the winter months, while in others the exemption extends for one year. The exemption does not extend beyond what is necessary to sustain the animals exempt in a given statute. "This exemption of food is given to render the exemption of the animals practically beneficial, as it would be of little use to exempt the animals if the

<sup>1</sup> Wallace v. Collins, 5 Ark. 41.

<sup>2</sup> Potter v. Hall, 3 Pick. 372.

<sup>3</sup> Quigley v. Gorham, 5 Cal. 418.

<sup>4</sup> Nichols v. Claybourne, 39 Texas 363.

<sup>5</sup> Hettrich v. Campbell, 14 Penn. St. 263.

<sup>6</sup> Carruth v. Grossie, 11 Gray 211; Tryon v. Mansir, 2 Allen 219; Pomeroy v. Treniper, 8 Allen 403; Johnson v. Babcock, 8 Allen 583; Hill v. Loomis, 6 N. H. 263. See Howard v. Farr, 18 N. H. 457.

<sup>7</sup> Wilkinson v. Alley, 45 N. H. 551; Cooper v. Neuman, 45 N. H. 339; Tryon v. Manser, 2 Allen 219; Lindsey v. Fuller, 10 Watts (Penn.) 144.

food necessary for their sustenance were liable to be taken from the owner. But if the debtor have none of the animals specified, the reason for exempting the food for them wholly fails."<sup>1</sup>

**§ 583. Wearing apparel.**—Statutes exempting wearing apparel from execution include all wearing apparel for immediate use, as well as clothes for religious holidays, and overclothes for all seasons.<sup>2</sup>

Wearing apparel in the hands of a tailor is exempt as necessary wearing apparel.<sup>3</sup>

**§ 584. Household furniture,** for family use, will not be confined to articles absolutely in use at the time of the seizure. Such a construction of the statute would be too narrow. The fact that there are household goods not in immediate and constant use is no objection.<sup>4</sup>

So, where under statutes exempting household furniture to a certain amount of money named in the statute, furniture of the value named in the statute is exempt, whether such furniture is necessary for the family use or not.<sup>5</sup>

**§ 585. Where property is claimed as exempt,** the burden of proof is on the claimant to show that at the time of the levy and sale on execution, the facts which entitle him to such exemption existed, and that the property claimed is in character such as is contemplated in the statute.<sup>6</sup>

<sup>1</sup> *Cowan v. Main*, 24 Wis. 569; *King v. Moore*, 10 Mich. 538; *Kennedy v. Philbrick*, 38 Maine 135; *Gailard v. Hilborn*, 23 Maine 442; *Farrell v. Higly*, Hill & D. Sup. (N. Y.) 87.

<sup>2</sup> *Bumpus v. Maynard*, 38 Barb. 626; *Sumbolf v. Alvord*, 3 Mees & Wells 248; *Peverly v. Sayles*, 10 N. H. 357; *Ordway v. Wilbur*, 16 Me. 263. As to when not exempt, see *Bowne v. Witt*, 19 Wendell 475.

<sup>3</sup> *Richardson v. Buswell*, 10 Met. 506; *Wentworth v. Young*, 17 Maine 70; *Shaw v. Davis*, 55 Barb. 389.

<sup>4</sup> *Haswell v. Parsons*, 15 Cal. 266; *Montague v. Richardson*, 24 Conn. 346.

<sup>5</sup> *Mannan v. Merritt*, 11 Allen 582.

<sup>6</sup> *Eastman v. Caswell*, 8 How. 75; *Griffin v. Sutherland*, 14 Barb. 456; *Dains v. Prosser*, 32 Barb. 290; *Carnsick v. Meyers*, 14 Barb. 11; *Van Sickle v. Jacobs*, 14 John. 434; *Chambers v. Halstead*, Hill & D. Supp. 385; *Tuttle v. Buck*, 41 Barb. 417; *Shaw v. Davis*, 55 Barb. 389; *Perkins v. Wisner*, 9 Iowa 320; *Ross v. Hannah*, 18 Ala. 125; *Briggs v. McCullough*, 36 Cal. 542.

## ADDENDA.

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REPORTS OF THE FOLLOWING CASES WERE RECEIVED WHILE  
THE WORK WAS PASSING THROUGH THE PRESS.

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**§ 112.** The title to land in which a homestead may be claimed need not necessarily be an absolute title in fee-simple, but it is necessary that the land be held by some kind of title or right, in order that the claim of homestead be allowed. A mere license to occupy and use land is not such a right, title, or interest as will avail a homestead claimant in maintaining such a right upon property set apart and designed as streets, alleys, places, or courts.<sup>1</sup>

**§ 119.** An equitable title is sufficient upon which to base a claim of homestead in Illinois, and an exemption claimant is entitled to hold property so situated as to title, against all the world, except the holder of the fee where there is a balance due for purchase-money, and against him upon payment of such balance.<sup>2</sup>

**§ 125.** The right of homestead in lands held in common is denied in Louisiana, on the ground that the claimant "may never become the sole owner of any part of it, because it may happen that a partition by licitation may be deemed most advantageous to the owners, and the partition made in that way." Where the interest in a piece of land of one of six heirs to the deceased father's estate was levied upon and it was claimed as a homestead, the Court said: "It

<sup>1</sup> *Randal v. Elder*, 12 Kan. 261. See Secs. 112, 113, 114, and cases cited.

<sup>2</sup> *Allen v. Hawley*, 66 Ill. 168.

is an incorporeal, and an incorporeal cannot be the object of the homestead act.'<sup>1</sup>

**§ 137. In Kansas, the land composing a city homestead** must be in a compact form, and must not be separated by an alley-way, or streets, or by the lands of others, but "two or more lots, or pieces, or parcels of land may, when adjoining and when united, constitute only one tract or body of land." "The language of the constitution is, that 'a homestead to the extent of 160 acres of farming land, or of one acre within the limits of an incorporated town or city, occupied as a residence by the family of the owner, shall be exempt from forced sale under any process of law.'<sup>2</sup> The language 'one acre (of land) within an incorporated town or city, occupied as a residence by the family of the owner,' certainly does not mean to include various tracts of land scattered through an incorporated town or city, amounting in the aggregate to no more than one acre ; and the word 'homestead' itself seems to mean the particular place occupied by the family of the owner as a home, and not to mean various tracts of land wholly detached from the homestead, although they may be used by the owner of the homestead.'" <sup>3</sup>

**§ 189. Release of part of mortgaged property, lien on homestead.**—Where husband and wife execute a mortgage on several pieces of land, one of which pieces is their homestead ; subsequently the mortgagee releases part of the land so mortgaged, receiving part of the mortgage debt, but does not release the homestead property : he may enforce his lien against the homestead for the unpaid balance, there being no implied contract or obligation on his part that he will exhaust all other property so mortgaged before resorting to the homestead, although a Court of equity, in decreeing a sale, will generally order all other property to be first sold before resorting to the exempt property.<sup>4</sup>

<sup>1</sup> *Henderson v. Hay*, 26 La. An. 156.

<sup>2</sup> Const. Kan., Art. 15, Sec. 9.

<sup>3</sup> *Randal v. Elder*, 12 Kansas 260.

<sup>4</sup> *Chapman v. Lester*, 12 Kan. 593.

**§ 198. Attachment lien on homestead prior to occupation.**—The law in relation to attachment of property was stated to be,<sup>1</sup> according to the decision of the Supreme Court of Nevada, that a lien of attachment was not such a lien as would debar a person entitled to the right from selecting or claiming a homestead in the mode pointed out by the particular statute after the levy of an attachment, but before a judgment was rendered in the case, and that the lien of the judgment did not relate back to the date of the attachment.<sup>2</sup>

The Nevada case was the only one to be found in the reports, at the time the foregoing principle was noted, where the point was directly involved. Since which time a case arising under somewhat similar facts has been decided in Kansas, wherein it is held that an order of attachment was such a lien as would prevent a homestead claimant, otherwise entitled to the right, from acquiring a homestead estate in land after the attachment and before the judgment; the latter Court holding that the claimant could then select his homestead “only in subjection to the attachment lien. An attachment lien, like other liens, though not an estate in the land, is such a vested interest therein that it cannot be affected by any subsequent act of the debtor.”<sup>3</sup>

**§ 225. Purchase-money of homestead.**—Where an exemption claimant is residing on premises under contract to convey, on which there is a balance due, and being pressed for payment, procures a third party to advance the money so due to the vendor, such third party taking a deed in his own name as security for such advance, will be entitled to a vendor's lien, and the money so paid will be treated as purchase-money.<sup>4</sup>

<sup>1</sup> Sec. 198.

<sup>2</sup> *Hawthorne v. Smith*, 3 Nev. 185.

<sup>3</sup> *Bullene v. Hiatt*, 12 Kan. 100. See *Tuttle v. Howe*, 14 Minn. 145; *American Exchange Bank v. Morris and Canal Banking Co.*, 6 Hill 362; *Hale v. Heaslip*, 16 Iowa 452; *Crocker on Sheriffs*, § 394; *Lamont v. Cheshire*, 6 Lans. (N. Y.) 234.

<sup>4</sup> *Allen v. Hawley*, 66 Ill. 170.

**§ 251. Alienation by the husband before occupancy of a lot adjoining the homestead, and which was intended as a part of the homestead, but which was not actually used till after conveyance, will prevent the right of homestead attaching to such premises, though subsequently to the deed a kitchen is built upon such lot and used by the family.<sup>1</sup>**

**§ 252. 1st. The false representations in procuring the wife's signature to a deed of the homestead, by the husband asserting that he had purchased other lands for a home, is not sufficient to avoid the result of the act. If the wife relies on such representations she does so at her peril, as the Courts will not afford her relief based upon such grounds.<sup>2</sup>**

**2d. Conveyance signed by the wife under duress.—**The consent of the wife required by the statutes in prescribing the manner in which the homestead may be alienated, is such consent on her part as is evinced by her free and voluntary act. Thus, where a wife is compelled to sign a deed of conveyance by threats and menaces of her husband and the purchaser to take her life if she refused, on her application a deed so executed will be set aside and declared void as to her.<sup>3</sup>

**§ 269. Property mortgaged before occupation subject to the right of homestead.—**In Louisiana, it is held that where property is mortgaged subsequent to the passage of the homestead law, but before occupation of the premises, the mortgagee takes the mortgage subject to the contingency of the mortgagor claiming the right of homestead under such law, upon foreclosure of such mortgage.<sup>4</sup>

**§ 270. 1st. Renewal of mortgage for part purchase-money by husband alone.—**If a homestead is purchased, and the purchaser and his wife execute a mortgage for the purchase-money, and include in the mortgage other indebtedness for which the homestead would not be liable, afterwards part of

<sup>1</sup> Grosholz v. Newman, 21 Wallace 486.      <sup>3</sup> Id.

<sup>2</sup> Helm v. Helm, 11 Kan. 21.

<sup>4</sup> Fuqua v. Chaffe, 26 La. An. 148.

the mortgage debt having been paid, the first mortgage is surrendered and a new one given, signed by the husband alone, for the unpaid balance due on the first mortgage, the holder of the renewal mortgage can enforce payment against the homestead only for so much as remains unpaid of the purchase-money of the land.<sup>1</sup>

**2d. Extension of time for payment of mortgage by husband alone.**—Where a mortgage of the homestead, the title to which being in the husband, is duly executed by the husband and wife to secure a debt of the husband, afterwards, when the note falls due, the husband can make a valid agreement with the holder of the mortgage to extend the time of payment without the wife's consent, and such extension, so granted, will not destroy the validity of the mortgage. The wife is not, in such case, such a surety for her husband as to entitle her to the rights and privileges of other sureties in the sense in which the word is used in law.<sup>2</sup>

**§ 303. An easement granted over premises occupied as a homestead,** such as a common road, railroad, or other privilege, does not in any manner affect its homestead character, as it is not an alienation, the fee to the land over which the easement is granted remaining in the grantor of such privilege or right.<sup>3</sup>

**§ 355. Widow's allowance by way of homestead.**—In Louisiana, a widow is entitled to the usufruct of one thousand dollars, during widowhood, by way of allowance under the homestead law, but if she has any money or property of any kind, the amount or value of such money or property will be deducted from the statutory allowance ; thus, where the widow owned \$215 worth of furniture, and \$140 rent received by her, it was held that these two sums should be deducted from the homestead allowance, whether the furniture belonged

<sup>1</sup> Pratt v. Topeka Bank, 12 Kan. 570.

<sup>2</sup> Jenness v. Cutler, 12 Kan. 515.

<sup>3</sup> Randal v. Elder, 12 Kan. 261. See Sec. 303.



to the widow or not.<sup>1</sup> And where she has no children of her own, and there are minor heirs of her deceased husband by a former wife, she will be required to give security for the usufruct.<sup>2</sup>

**§ 359. Lien of vendor of movables inferior to minor's allowance.**—In Louisiana, the vendor of movables has not a superior right to that of a minor in necessitous circumstances to an allowance under the homestead law. It is held that the words “except those for the vendor's privilege,” in the homestead statute, “have reference alone to the privilege of the vendor of real estate”; that, therefore, the claim (\$1,000) of the minor will prevail over that of the vendor of movables.<sup>3</sup> In successions, the homestead is given the highest privilege except one, that of the vendor of realty.<sup>4</sup>

**§ 397. In Illinois, liens of creditors of a deceased householder** will not attach to the homestead until the youngest child attains the age of majority.<sup>5</sup>

**§ 409. Widow's right to homestead as against heirs.**—In Illinois, it has been the rule of law, that the widow was not entitled to a homestead as against the children who are the heirs, in a suit for partition, where there are no debts against the estate. This rule is now changed by recent amendments to the statutes.<sup>6</sup>

**§ 412. An administrator's sale of the homestead to pay debts,** based upon a decree of Court reciting that at the time

<sup>1</sup> Succession of Tobias Drum, 26 La. An. 539.

<sup>2</sup> Corner v. Bourg, 26 La. An. 615.

<sup>3</sup> Succession of Cooley, 26 La. An. 166.

<sup>4</sup> Succession of Bouvet, 25 La. An. 431.

<sup>5</sup> Wolf v. Ogden, 66 Ill. 226, 227.

<sup>6</sup> Sontag v. Schmisser, Sup. Ct. Ill., June 16, 1875, 2 Western Jurist, 316: “If dower has not been allowed to the person entitled thereto, or the homestead set off, in case any party to the suit is entitled to an estate of homestead in the premises, or any part thereof, such dower may be allotted, and such homestead set off by the Commissioners, and if the Court shall so direct, the premises so allotted or set off may be partitioned among the claimants thereto.” “This statute only applies to cases arising since the passage of the statute.”—Ed. West. Jurist Sept., 1875, Vol. 2, No. 5.

of the making of such decree the homestead had been abandoned, will not be sustained unless the evidence be preserved in the record upon which such decree is based, and the petition upon which the application to sell is made must allege that the premises have been abandoned, otherwise upon appeal the decree will be reversed. The presumption that sufficient evidence was offered to support the decree does not apply in such case.<sup>1</sup>

**§ 418. Consent to a decree by the husband bars his right to relief by a bill filed by husband and wife to set aside such decree entered by consent of the husband in a chancery suit in which the homestead was involved ; but the wife is not bound by such act of the husband where it is shown that she did not consent to such decree and was not aware of its entry, as it is against the policy of the law to allow any act of the husband to have the effect of depriving the family of the exemption, except by the approbation of the wife in the manner pointed out by law. In such case, although the husband will be estopped by his own act in consenting to the decree, the wife will be granted relief, and restored to her rights of homestead.<sup>2</sup>**

**§ 420. 1st. The wife may assert her right by original bill to the homestead, in Illinois, where she has not signed the deed or mortgage or released her right to the same, and this, though there is a failure to set up the right in the foreclosure proceedings.<sup>3</sup>**

**2d. Account for rents and profits wife's right.—**Where a wife, by bill filed for that purpose, recovered her homestead, which had been sold under deed of trust in which she did not release her homestead right, and the purchaser at such sale obtained possession by decree entered by consent of the husband in a suit in equity, without the knowledge of the

<sup>1</sup> Wolf v. Ogden, 66 Ill. 225.

<sup>2</sup> Allen v. Hawley, 66 Ill. 168.

<sup>3</sup> Allen v. Hawley, 66 Ill. 169, citing Mooeres v. Dixon, 35 Ill. 208 ; Wing v. Cropper, 35 Ill. 256 ; Silsbe v. Lucas, 36 Ill. 462 ; Hoskins v. Litchfield, 31 Ill. 137.

wife, and held such possession for several years, and had further succeeded to a claim of four hundred dollars purchase-money : it was held that the wife was entitled to an accounting and to have the rents and profits of the homestead during the period of such possession by the purchaser under the deed of trust, less taxes and repairs and the four hundred dollars due as purchase-money.<sup>1</sup> So, where the wife is unlawfully dispossessed of the homestead, under a judgment in ejectment against the husband, who had left his wife, she not being a party to such suit : held, that she is entitled to have all the rents and profits arising from the statutory homestead, less taxes and necessary repairs.<sup>2</sup>

**3d. Lapse of time in asserting the right by the wife** will not defeat her claim to the homestead, where she has been abandoned by her husband, and has been unlawfully and forcibly dispossessed of the same by color of legal process, and although she has been out of possession for many years.<sup>3</sup>

**§ 456. 1st. Estate of homestead—Interest of the wife in Kansas.**—The wife's interest in the homestead is thus spoken of in Kansas : “It may be said that the wife has in one sense an estate in the homestead occupied by herself and husband, although the title to the same may be in her husband ; but still, if it is an estate, it is such an estate as has never been defined by law, an estate unknown to the common law, technically no estate at all. The whole estate in such a case is, in fact, in the husband, with merely a restriction for the benefit of his family upon his power to alienate the same.”<sup>4</sup> “It may be difficult to define the estate,” of the wife, “but it is one, nevertheless. It is not like dower. Dower is only a possible estate, an inchoate interest that, depending on certain events, the wife may never enjoy. That the wife's right under our homestead laws is an existing interest, probably none will deny.”<sup>5</sup>

<sup>1</sup> *Allen v. Hawley*, 66 Ill. 170.

<sup>3</sup> *Mix v. King*, 66 Ill. 146.

<sup>2</sup> *Mix v. King*, 66 Ill. 148.

<sup>4</sup> *Jenness v. Cutler*, 12 Kan. 516.

<sup>5</sup> *Helm v. Helm*, 11 Kan. 22.

**2d. The wife's right to sue to recover the homestead** during the lifetime of her husband and in her own name is sanctioned by the Courts of Kansas, where she is compelled to join her husband in alienating the same by threats against her life, and after such execution of the deed he abandons her. "The homestead cannot be alienated without the joint consent of the husband and wife. The wife's interest is an existing one. The occupation and enjoyment of the estate is secured to her against any act of her husband or of his creditors, without her consent. If her husband abandons her, that use remains to her and the family; with or without her husband, the law has set this property apart as her home." "She, then, having been compelled to sign away the interest by duress, has a right to come into Court and have that act declared null and void, so that her rights shall not be lost by the illegal conduct of those who attempted to profit by their violence. When her signature is declared void, the law comes in and disposes of the deed made by her husband without her consent."

The purchaser demurred to the wife's petition on the grounds—

"1st. That the plaintiff herein had no legal capacity to sue as sole plaintiff, she being a married woman, and the claim not having accrued upon or out of her own personal estate, separate and apart from the property of her husband.

"2d. That there is a defect of parties plaintiff, the said Samantha being a married woman, and her husband not being joined with her as plaintiff.

"3d. That the petition does not state facts sufficient to constitute a cause of action."<sup>1</sup>

**3d. The wife has not the right to sue**, even in the name of her husband, in Louisiana, to protect the homestead, and if she attempts to protect it, in the absence of her husband, she will be mulcted in damages in the sum of \$500 for attempting to assert the right. Where the husband confessed judgment in 1872, and an execution issued the following year,

<sup>1</sup> Helm v. Helm, 11 Kan. 21; Allen v. Hawley, 66 Ill. 169; Mix v. King, 66 Ill. 145.

the property claimed as a homestead was seized and advertised for sale, when a petition was filed in the name of the husband and wife, praying for an injunction to restrain the sale of the plantation, on the ground that they were entitled to a homestead. The wife made the affidavit and executed the bond for the injunction, having been authorized to do so by the judge, on proof that the husband was absent. There was judgment in the lower Court in favor of the wife for one hundred and sixty acres of land. It appears "that the plantation seized belonged to the husband, the debtor; that he and his wife resided in Franklin, more than a year preceding the seizure, and that the husband had left the State, apparently with the intention not to return to St. Mary parish. It further appears that Mallon and wife have no children or other person directly or legally dependent upon them. It is therefore manifest that they have no right to the benefit of the homestead act. But the husband, who alone could have asserted the right, if it existed, is not before the Court, and we cannot, therefore, decide any thing to affect his rights. The wife has asserted no right personal to herself in this suit, and she has no right to represent her husband in the matter, nor can she bind him by her acts.

"It is therefore ordered and adjudged that the judgment of the District Court be annulled, and that there be judgment in favor of the defendant against the plaintiff and her sureties on the injunction bond for \$500 damages. It is further ordered that the costs in both Courts be paid by the plaintiff." <sup>1</sup>

**§ 542. Wife's right of exemption—Waiver by husband.**—The wife of a debtor, in Pennsylvania, has the right of retaining articles which are exempt, although her husband waives such right under a law which says, "that the wife and family, if any, of such debtor, shall be entitled to retain for their own use such articles as may by law be exempted from levy and sale on execution." Such waiver, it was said, was good against him, but the wife's right was not affected. "In such case the law withdraws the property to the extent of the

<sup>1</sup> Mallon and Wife v. Gates, 26 La. An. 610.

exemption from the grasp of his creditors, and allows it to remain with his wife and family, for their use. ”<sup>1</sup>

**Appraisers appointed to value homestead.**—The value set upon a homestead by appraisers, appointed for that purpose upon the levy of an execution, is conclusive on the parties to the proceedings as to that value, unless invalidated by some proceeding instituted for the purpose of revising the record. It will not be permitted to be questioned in a proceeding subsequently instituted to effect a partition of the premises between the debtor and the creditor to whom the residue has been assigned.<sup>2</sup>

**The right of homestead continues, in Illinois,** until the youngest child attains his or her majority, where on the death of the householder the family is in the possession of the premises.<sup>3</sup>

**Limitation as to time, in Illinois,** in which to apply for the sale of real estate by the administrator to pay debts of decedent, will be barred after the lapse of seven years, unless the delay can be explained, and in this respect each case must depend on its own circumstances. This rule applies as well to the homestead as to other property.<sup>4</sup>

**Who entitled to the right of a rural homestead in Louisiana.**—The law in relation to the exemption of one hundred and sixty acres of land with the improvements, together with the work-stock, supplies, etc., in the Act of 1852, only applies to, and was intended for, a farmer. The law does not apply to a house and lot outside of the city limits, purchased and occupied by an attorney at law.<sup>5</sup>

**Surplus proceeds of sale under judgment lien.**—Where there are two judgments against a debtor, one of which is a

<sup>1</sup> *Hess v. Beates*, Sup. Ct. Penn., May 31, 1875, 32 Legal Int. 336.

<sup>2</sup> *Barney v. Leeds*, (N. H.) 4 Am. Law Rec. 29.

<sup>3</sup> *Wolf v. Ogden*, 66 Ill. 225.

<sup>4</sup> *Wolf v. Ogden*, 66 Ill. 225.

<sup>5</sup> *Hargrove v. Flournoy*, 26 La. An. 645.

lien upon the homestead, and the sheriff sells such homestead and satisfies the judgment which is a lien upon the homestead, and there is a surplus in the hands of the sheriff which he pays over to the other judgment-creditor upon an order of the District Court, which is obtained without notice to the judgment-creditor, or any appearance by him, such an order, so made, is at least voidable, if not absolutely void, and gave the parties obtaining it no right. "Said money was the proceeds of the forced sale of the homestead, and was, therefore, exempt from execution issued on any judgment which was not a lien upon the homestead, so long as the claimant desired and expected to use said money in purchasing another homestead, or in redeeming his aforesaid homestead from forced sale." <sup>1</sup>

<sup>1</sup> Mitchell v. Milhoan, 11 Kan. 624.

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